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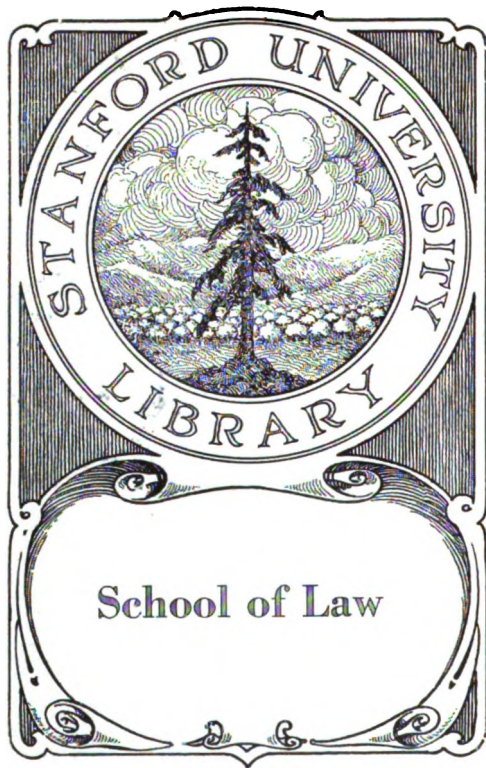
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Illinois Law Review

VOLUME XV



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THE ROMAN LAW ELEMENT IN THE SWISS CIVIL CODE OF 1912

By THOMAS R. ROBINSON

Roman law existed, strictly, only in Rome as a creature of Roman jurisdiction, the child of the city of the Cæsars. But apart from this strict sense, and in a much more humanly vital way, Roman law lives, and will live as long as man needs law. Those forms which lost their substance when the empire disintegrated have been scattered broadcast over the face of the earth, to be quickened into new life by fresh legislative impulse. Those rules, institutions, traditions, and modes of thought, originating within the walls of the imperial city, had stretched their tendrils far beyond its confines and taken root long ere the parent stem had vanished, and today we find them growing, in their new homes, in most cases with undiminished vigor and bearing unmistakable evidence of their paternity.

The official text of the Swiss Civil Code of 1912 is in three languages, Italian, German, and French. Roughly we divide the people in their legal development along these lines. To trace each provision, of which there are nine hundred and seventy-seven, back through the annals of legislative effusion, customary law, and tribal tradition would indeed be absorbingly interesting. History gives us our needed probative link to show the connection of the Swiss people both historically and intellectually with the civilization of the Roman empire.

For a schematic arrangement, that of the code itself is adopted for two reasons: it is an extremely satisfactory one from a logical point of view; and, as one element in our consideration is the code itself, it is far better not to attempt any mutilation of it, even though necessary to aid slightly in the exposition which is to follow.

As for the substantive treatment, a general comparison of the main institutions embodied in the code, with a detailed citation to the Roman law authorities, for specific points of similarity, will be all that is attempted. In this connection it may be well to remark that the Roman law sought to be compared with this our most recent codification is that of the greatest of all Roman codifiers—Justinian.¹

Introduction: Articles 1-10. In these provisions forming as they do the background for the other more detailed regulations of the code, there are certain strong Roman doctrines, some less so and some of only a shadowy likeness.

Of the first class is paragraph 8, which provides, in the words of the Digest,² that on him who asserts lays the burden of proof.

Article 1 bears a resemblance to the distinction made between 'jus strictum' and the 'jus honorarium' of the praetor by imposing on the judge, in case there is no positive rule to guide him, the duty to proceed according to his best conception of right and justice, having in mind the while the most approved practice and scientific theory. This then might be said to be of the second class.

As for those faint suggestions of Roman law, Article 2 might be mentioned (which provides that it shall be the duty of everyone to act with honesty and good faith), and Article 4 (enacting what in effect is somewhat similar to the initial paragraph, that a judge when allowed the exercise of his discretion must proceed to an equitable decision).

The treatment accorded these introductory provisions is not to be followed, however, in the remainder of this essay. Only those paragraphs which have their counterpart in some provision of the Corpus Juris will be cited, and the rest of a less certain origin to a great extent will be wholly omitted.

I

FIRST PART: LAW OF PERSONS

FIRST TITLE: NATURAL PERSONS

First Section: The Law of Personality. The points where the general Swiss rules on this subject find similar provisions in the Roman sources are to be found in Article 15, providing for the

1, The 6th century codification of Justinian, now called the Corpus Juris Civilis, consists of the Code (A. D. 529), Digest or Pandects (A. D. 533), Institutes (A. D. 533), and Novels (A. D. 535-565).

2. D. 22, 3, 2.

emancipation of minors, thus adopting the Roman institution of like name.³ The consent of the child is also required as at Roman law,⁴ which, however, made it unnecessary, for obvious reasons, when the child was an infant.

Again, in Article 19, regulating the effect of acts of persons not *sui juris*, the two systems are brought into striking parallel. Thus we find in the *Institutes*⁵ and in the *Digest*,⁶ that a person capable of acting at all under power must have the consent or representation of his legal guardian to be bound by his acts, although for those transactions resulting advantageously to him such consent is not necessary. For the torts of such a person both systems provide liability.⁷

In Article 20 the Swiss code enacts the Roman system of reckoning relationships⁸ by computing, in the language of the cited passage, the proximity of two relatives by the number of births intervening—a most striking adoption of foreign law, when one considers the multitude of other systems found in the Germanic tribes whose laws formed the basis of so much of Swiss legal thought.

Article 23 re-enacts the Roman rule of domicile,⁹ except in so far as it limits a person to one domicile, which was not the case at Roman law.

Article 26 contains a rather detailed provision that one attending school in a foreign place does not thereby lose his old domicile; and were it not for exactly the same enactment in the Code,¹⁰ it would hardly be worthy of mention. But with this Roman counterpart, its insertion becomes doubly significant; for that broad doctrines, based much upon general human experience, should develop independently along similar lines is, perhaps, only to be expected; but it is these very details which show beyond the slightest doubt the dependence of the copy on its pattern.

Personality commences with birth and ends with death; and that the unborn child, provided it be ushered into this world while still alive, shall have protection for all its rights, is the tenor of Article

3. See *Inst.* 1, 12, 6-10; *D.* 1, 7; *C.* 8, 49.

4. *C.* 8, 49, 5.

5. *Inst.* 1, 21, 1.

6. *D.* 19, 1, 13, 29.

7. See the noxal actions: *Inst.* 4, 8.

8. *Inst.* 3, 6, pr.

9. *D.* 50, 1, especially 20.

10. *C.* 10, 39, 2.

31. As to the first two propositions, the doctrine seems not to be exactly or succinctly put in the *Corpus Juris*, at least to the author's knowledge, but that it was a vital part of Roman jurisprudence is undeniable.¹¹

Article 32, providing that there shall be no presumption of death, is also of Roman likeness.¹²

Second Section. This section contains detailed provisions as to recording of the civil status of no particular interest to our investigation.

SECOND TITLE: THE LEGAL PERSON: ARTICLES 52-89

First Section: General Rules. Article 52, in its detailed regulation of the way in which legal personality is to be attained by corporations and 'Stiftungen' (the German word in the Swiss code is used because there seems to be no expression for the idea in English), lays down only by inference, but nevertheless undoubtedly, that legal personality may be only acquired by conformity to law.¹³

Articles 53 onward, to the particular rules of corporations, provide for the exercise of the personality thus acquired, none of which rules bear a resemblance to Roman doctrines.

Second Section: Corporations: Articles 60-79. This section contains many details which might be expected in a modern system of corporation law made to regulate these institutions that play such an important part in present day civilization, which would not be found in a compilation of the period of the *Corpus Juris*. There is, however, one exception. In paragraph 67 we find the rule that a majority of the members control the acts of the whole body.¹⁴

Third Section: Stiftungen. The same comment is also applicable here. There are merely more detailed provisions for the recording, management, and winding up of these institutions which find no counterpart in Roman law.

11. See *Mackeldey*, "Roman Law," Dropsie's translation of the 14th German edition, and for the protection of the foetus, which was the same in both systems, see D. 1, 5, 7; Inst. 1, 13, 4; D. 1, 5, 26; D. 5, 4, 3, 32.

12. *Mackeldey*, § 153, n. 9.

13. For the like Roman rule see D. 47, 22, 3; D. 3, 4, 1; and as to *pia causa*, the Roman 'Stiftungen,' see *Mackeldey*, § 157, n. 5.

14. See D. 50, 17, 160, par. 1.

II

PART TWO: FAMILY LAW

FIRST DIVISION: THE LAW OF MARRIAGE: THIRD TITLE: THE
CELEBRATION OF THE MARRIAGE: ARTICLES 90-130

First Section: The Engagement. At the outset, the definition of the contract of engagement as the mutual promises to marry (Article 90) is an almost exact translation of the Digest,¹⁵ and the provision making the consent of the legal representative necessary, as in the case of marriage, is an echo of the Digest.¹⁶

In Article 94 it is provided that should the betrothal be broken off the presents made in contemplation of marriage may be demanded back, and should they have been consumed or lost, then their value is recoverable, except in the case of death, which bars both claims. The Roman rule was similar.¹⁷

Second Section: Marital Capacity and Impediments. Article 98 makes the consent of the representative necessary for a valid marriage between minors or a minor and an adult. The rules are substantially the same at Roman law.¹⁸

Marriage is forbidden (Article 100) between blood relatives in the direct line, brothers and sisters, uncle and niece, and nephew and aunt.¹⁹

A divorced or widowed woman is required to wait at least three hundred days, by Article 103 of the Swiss Code, before entering a new marriage relationship. Strict as this is, Roman law was a little harder on her and added sixty-five days ('annus luctus') more, as a sort of slow but sure precaution.²⁰

Third Section: Publication and Marriage. This section contains purely local provisions regulating the Swiss civil marriage.

Fourth Section: Invalidity of the Marriage. In this section, Article 120 draws our attention first. It gives the grounds on which a marriage may be declared invalid. They are: bigamy, lack

15. D. 23, 1, 1.

16. D. 23, 1, 7.

17. See C. 5, 3, 6, except that the death was no bar and, apart for half the gifts so made, provided "Si ab sponso . . . interveniente osculo ante nuptias," all could be reclaimed.

18. See Inst. 1, 10, pr.; D. 23, 1, 7; D. 23, 2, 2.

19. This is the exact Roman rule (Inst. 1, 10) between certain relatives through marriage, even when that relationship has been dissolved by death (Inst. 1, 10, 9) and between an adopted child and its adopter or his spouse (Inst. 1, 10, 1; D. 23, 2, 55; D. 23, 17, 2).

20. See C. 5, 17, 9.

of consent, and relationship between the parties of a forbidden degree. Similar rules are found in the *Corpus Juris*.²¹

Article 130 declares the effect of a marriage, premature under the rule of Article 103, to be the same as at Roman law.²²

FOURTH TITLE: DIVORCE: ARTICLES 137-158

Of the grounds for divorce noted in this title, adultery,²³ plot against the life of the other spouse,²⁴ and desertion, although the time necessary was longer,²⁵ are distinctly Roman, and indeed, in substance, Article 139 adding as another ground for divorce what is very similar to the effect of '*maxima capitis deminutio*,'²⁶ is only a shade less striking.

There is still another provision bearing a marked similarity to Roman law: this is Article 154, making invalid, on a divorce, the testamentary provisions made prior thereto.²⁷

FIFTH TITLE: THE CONSEQUENCES OF MARRIAGE, IN GENERAL: ARTICLES 159-177

In Article 160, making the husband the head of the conjugal union and giving him the power to fix the marital residence, we have the rule laid down in the Code.²⁸

And in Article 161, giving the wife the citizenship and dignity of her husband, the Code²⁹ is repeated.

SIXTH TITLE: MATRIMONIAL RÉGIME: ARTICLES 178-251

Contracts to regulate the property relations of the spouses were allowed at Roman law and could be made before and after the marriage.³⁰ Article 179 contains a similar provision; but at Swiss law certain definite forms of the marital régime are imposed unless

21. For bigamy C. 5, 5, 2 and C. 9, 9, 18; Inst. 1, 10, 6-7; D. 3, 2, 1; and for the other rules, these seem the result of necessary inference from D. 23, 1, 8 (providing that lack of consent at time of the engagement invalidates it), and D. 23, 2, 60, 5 (enacting that one may not enter into a betrothment with one it is impossible to marry). A fortiori it would seem that there could be no valid marriage where a valid engagement was impossible. As for the corresponding provisions as to relationships, see same point under Article 100.

22. D. 3, 2, 1, and 11, § 1, namely, not to affect the validity of the new marriage.

23. Article 137; C. 5, 17, 8.

24. Nov. 117, 9, 2-4.

25. C. 5, 17, 7; Nov. 22, 14; Art. 140.

26. D. 24, 2, 1.

27. See D. 32, 49, 6; D. 38, 11.

28. C. 5, 16, 24, and C. 9, 47, 22.

29. C. 10, 39, 9.

30. See D. 23, 4, 1, pr.

a contractual one³¹ was adopted; whereas at Roman law the marriage had no effect upon the property of either spouse, and any kind of a contract arrangement could be adopted by them.

The remaining sections here contain nothing distinctively Roman.

SECOND DIVISION: RELATIONSHIP; SEVENTH TITLE: THE STATUS OF
LEGITIMATE CHILDREN: ARTICLES 252-302

First Section: Legitimate Descent. Article 252 contains the Roman rule as to the presumption of legitimacy, which arises if a child is born within three hundred days after dissolution of the marriage relation.³²

And, conversely, Article 254 provides for the presumption arising during marriage, should a child be born after the end of the first one hundred and eighty days. The Roman rule, under like circumstances, was one hundred and eighty-two days.³³

Second Section: The Declaration of Legitimacy. Swiss law provides by Article 258 what virtually amounts to legitimation 'per subsequens matrimonium,' which was, however, as will be remembered, limited to children of a concubine,³⁴ and holds that should the father and mother of the illegitimate children marry, they, ipso facto, become legitimate. The distinction made at Roman law between concubinage and other illicit sexual relations seems to have rested on slavery, and as this latter is not an element of legislative concern today, the two provisions may be treated as substantially the same.

Article 260, in making the consent of the child necessary before a valid legitimation is possible, reminds one of the same rule found in the Digest.³⁵

Third Section: Adoption. In the first paragraph of this section is contained one of those passages where the Swiss rule in many particulars squares so beautifully with the like provision in the Corpus Juris that it is worthy of special comment. Article 264, apart from the positive age limit, provides that the person adopting must be at least eighteen years the senior of the adoptee.³⁶ And

31. And these, too, must be of a specific nature—see the remaining sections of this Title.

32. See D. 38, 16, 3, § 11; D. 28, 2, 29, pr.; C. 6, 29, 4.

33. See D. 1, 5, 12.

34. C. 5, 27, 5, 6, 10; Inst. 1, 10, 13.

35. D. 1, 6, 11.

36. For exactly the same provision, see Inst. 1, 11, 4; D. 1, 7, 40, § 1.

also that the adoptor must have no legitimate children of his own—the same was the rule at Roman law.³⁷

Again, Article 265 gives to the adoptee a voice in that most important affair, his own adoption. This was also the rule at Rome for the two forms of adoption.³⁸

The old form of thrice repeated sale of the Roman child, in order that he might be adopted, was modified at Justinian's time, and the adoption could take place before a competent judge.³⁹

The effect of the adoption at Roman law was greatly modified by the later development, until only certain adopters—as the grandfather on the mother's side—could claim full parental power over the child.⁴⁰ The Swiss law, however, in some respects is broader. Thus the adopter may, by Article 268, acquire full power over the child, although the right to inherit from the natural parent's family is found in both systems undisturbed. That the adoptee becomes a member of the adopter's family is also common to both.⁴¹

The sections comprising the remainder of this title (section fourth (Community of Parent and Child), section fifth (Paternal Power), and section sixth (Paternal Property Rights)) contain no distinctive Roman doctrines, and will consequently be passed over.

EIGHTH TITLE: STATUS OF ILLEGITIMATE CHILDREN

That illegitimate children should bear relationship only to the mother seems (in the words of the Digest⁴²) to be a law of nature.⁴³ It certainly found place among all early peoples, and it lives with us today. We are not surprised, therefore, to find in Article 302 that the Swiss law is the same. There is, however, in the same article a doctrine of much stronger Roman distinctiveness: the acknowledgment before a magistrate was a method of creating relationship between child and natural father well recognized at Rome.⁴⁴

Article 303 gives the forms which are to be followed and which bear a similarity to those described in the Code⁴⁵ (in so far as the acknowledgment follows on a request directed to the proper state

37. See D. 1, 7, 17, 3.

38. See for adoptio D. 1, 7, 5, and for adrogatio D. 1, 7, 2.

39. C. 8, 48, 11; Inst. 1, 11, 1; Inst. 1, 12, 8; D. 1, 7, 2, pr., and 4. Art. 267 makes the form the same for Switzerland.

40. Inst. 1, 11, 2.

41. See D. 1, 7, 23.

42. D. 1, 5, 24.

43. See Inst. 1, 10, 12; Inst. 3, 5, 4.

44. See Nov. 117, 2.

45. C. 5, 27, 11.

official or judge), and that of the Novels⁴⁶ (allowing such recognition to be made by testamentary provision).

The Code⁴⁷ and the Novels⁴⁸ exclude the children of an incestuous or adulterous connection from any claim on the father, and indeed forbid him to recognize them at all. Swiss law is equally severe.⁴⁹

Article 307, giving an action to the mother of an illegitimate child and to the child itself, reminds one very strongly of the 'actio de partu agnoscendo,' especially in its later development. Up to the time of Justinian, however, the action seems only to be allowed a divorced wife to protect her offspring and to a wife against her husband, refusing to recognize a child born during the conjugal relationship. Later, however, there was an 'actio du partu agnoscendo utilis' given to both child and mother, exactly as at Swiss law. This was introduced by the Canon law, and hence has strictly no place here.

NINTH TITLE: THE FAMILY COMMUNITY

While this title shows some traces of Roman influences, there are no sufficiently clear examples to warrant a detailed exploration. The law of family property is one of those fields in which there seems to have been much change. The older Roman family relation was greatly weakened at the time of Justinian, and it is not to be wondered at that the new structure raised by modern systems to take its place should bear it but faint similarity.

THIRD DIVISION: GUARDIANSHIP; TENTH TITLE: GENERAL LAW OF GUARDIANSHIP: ARTICLES 360-397

First Section: Instrumentalities of Guardianship.

Second Section: Cases of Guardianship. Article 368 reads: "Every person not of age, and not under parental power, is subject to a guardian." The Roman guardianship of minors is provided for by this paragraph.⁵⁰

Articles 369-370 set out the cases in which a guardian ('curator' is purposely avoided, for the distinction made at Roman law between him and a 'tutor' is not strictly followed), may be had for a person of full age: namely, where he is mentally deficient, prodi-

46. Nov. 74, 2, 1.

47. C. 5, 5.

48. Nov. 89, 15.

49. Art. 304.

50. See D. 26, 5, 13, 2; C. 5, 60, 2 (by inference).

gal, or a drunkard. For the mentally weak or insane, see the rules of the Corpus Juris.⁵¹

Third Section: Jurisdiction (of court). This section contains only local provisions.

Fourth Section: The Appointment of the Guardian. Among the qualifications prescribed for guardians in Article 379 is that he must be an adult. This is the same as in the Institutes.⁵²

Article 380 provides that in selecting the guardian the relatives of the person to be placed under him should be chosen first if there is no good reason to the contrary; and, in the light of what follows,⁵³ this would seem to impose a duty on them to accept. This is the Roman rule.⁵⁴

That the wish of the person to be put under a guardian, or of his mother or father, is to be followed in the selection, if there is no reason against it, is the rule of Article 381. This is another of those special details which are so significant for our investigation, for exactly the same provision was made by Justinian.⁵⁵

Again, in article 382, which imposes a legal duty to accept the guardianship on all citizens who may be called thereto, we have a very important indication of the origin of the whole law on this subject. This could hardly be called a detailed provision and suggestive on that account. It is, on the contrary, very broad and fundamental, impressing on the whole system of Swiss guardianship law an indelible Roman stamp. Particularly is this so, for the duty is a thing of distinctive Roman growth,⁵⁶ which has only found place in those systems which are direct offshoots of it. Thus it will be recalled that English law never attempted to drive a person to assume the office of guardian in any way, not to mention the "extraordinary force" of the above cited passage.

The deep-seated import of this provision will become more apparent through what is to follow, because by imposing a duty we would expect to find grounds for excusing its non-performance, as at Roman law; and these we meet immediately in Article 383. Let us see how they compare with those of Rome. At Swiss law a person of over sixty years might be excused; ten years were added by the Corpus Juris,⁵⁷ and the age limit fixed at seventy. Persons

51. D. 26, 1, 3, 1; and for the spendthrift, D. 27, 10, 13; C. 5, 70.

52. Inst. 1, 25, 13; C. 5, 30, 5.

53. Art. 382.

54. See Inst. 1, 17, pr.

55. See D. 26, 3, 1 § 3, 2 § 1; D. 27, 10, 16, pr., and § 1.

56. D. 26, 7, 1, pr.

57. Inst. 1, 25, 13; D. 27, 1, 2, pr.

physically unfit can also plead their disability in excuse when summoned to assume the office; at Roman law the matter was gone into a little more in detail, and persons insane,⁵⁸ deaf and dumb,⁵⁹ and blind⁶⁰ were also allowed the same privilege—except that in the two first cases they were absolutely incapable to assume the duties of a guardian whether they would or not.⁶¹

Again, another ground of excuse is the existing exercise of parental power over four other children. This is an adoption of the Roman rule as to persons domiciled in Italy, as distinguished from Rome on one hand and the provinces on the other, where three or five children respectively would excuse.⁶²

Another Swiss ground was the existence of two other guardianships or one of a particularly time-consuming nature. The Roman rule was three.⁶³ And the Digest⁶⁴ makes the same exception when the duties are particularly onerous.

The fifth and sixth Swiss grounds, which may be said to consist in the holding of public office, are covered by similar provisions in the Institutes,⁶⁵ which exempt any person exercising public authority from the duty of accepting a guardianship, but gives him no excuse for abandoning one already assumed.

Those persons absolutely incapable of being named as guardians are enumerated in Article 384. First among these are persons themselves under a guardian.⁶⁶ Second, persons deprived of citizenship. The Roman rule excluded slaves and non-Romans,⁶⁷ and 'maxima capitis deminutio' dissolved the guardianship as it did marriage and the 'patria potesta.'⁶⁸ Third, antagonism to the interests of the ward, which also was a bar at Roman law.⁷⁰ The fourth ground is purely local.

Fifth Section: The Curatorship. In Swiss law a curator seems to be given as a sort of temporary measure to accomplish some particular piece of business or during some passing disability of the

58. Inst. 1, 14, 2; D. 26, 1, 17.

59. D. 26, 1, 1 §§ 2-3.

60. D. 26, 8, 16; D. 27, 1, 40.

61. *Infra*, Art. 384.

62. See Inst. 1, 25, pr.; D. 27, 1, 2 §§ 2-8, 18, 36 § 1; C. 5, 66, 1.

63. Inst. 1, 25, 5; D. 27, 1, 2 §§ 9, 3-5, 15 § 15, 17, pr.; C. 5, 69.

64. D. 27, 1, 31 § 4.

65. Inst. 1, 25, 3.

66. The same rule is found in Inst. 1, 25, 13, and C. 5, 30, 5.

68. See C. 5, 34, 7.

69. See Inst. 1, 13, 1, and Inst. 1, 22, 4.

70. See Nov. 72, 1, 2, 3, 4.

person under him. The Swiss law is, on the whole, similar to the German in its abandonment of the strict Roman distinction based on age between the tutor and curator.⁷¹ But there are, however, some faint indications pointing the other way.⁷²

Nevertheless, as to the other cases in which curators were appointed at Roman law, the Swiss provisions are in substantial agreement: thus, in Article 392, invalids,⁷³ persons whose interests conflict with those of their guardians,⁷⁴ and those subject to a guardian, themselves are incapable.⁷⁵

Article 393 provides for what resembles strongly the case of dative curatorship, for it enacts that a 'curator bonorum absentis' shall be appointed,⁷⁶ that incapable persons having no guardian shall be supplied with a curator by the court on its own motion,⁷⁷ that where a succession was uncertain a curator ('ex edicto Carboniana')⁷⁸ could be named, and that a 'curator ventris et bonorum'⁷⁹ was granted to protect the rights of an unborn child. The remaining cases are not Roman.

ELEVENTH TITLE: DUTIES OF THE GUARDIAN: ARTICLES 398-430

As at Roman law, the Swiss code, Article 398, imposes on the guardian the duty to make an inventory of the ward's property.⁸⁰

Articles 400 and 404 make the consent of the court necessary for the valid sale of the ward's movables and land respectively, as was required also by the Code.⁸¹

As for the duty to educate and support the ward, Article 405 makes it necessary that he be supplied with advantages commensurate with his station in life, as was also the rule of Roman law.⁸²

In Article 406 there seems to be a distinction made which reminds one of the difference in the condition of a minor person under guardianship and one of full age in the same position, which also suggests the Roman tutelage and curatorship based on age; but as this is the only place discovered to support the theory that this conception has been embodied in the code, we must, in view of the

71. See *Schuster*, "German Civil Law," § 454.

72. See *infra* Art. 406.

73. Inst. 1, 23, 4; D. 27, 10, 2.

74. Inst. 1, 21, 3; D. 26, 8, 2, 5, pr.; Nov. 72, 2.

75. D. 27, 1, 10 §§ 7-8, 12.

76. As in D. 50, 4, 1, 4; D. 42, 5, 22; D. 4, 6, 15, pr.; C. 8, 51, 3.

77. See Inst. 1, 23, 3-4; D. 27, 10, 1, pr.; D. 3, 1, 2; C. 5, 70, 1.

78. D. 37, 10.

79. D. 37, 9, 1 §§ 17-24; D. 26, 5, 20, pr.; D. 27, 10, 8; D. 26, 7, 48.

80. See C. 5, 37, 24, which also provided that this inventory shall be made in the presence of a public official.

81. C. 5, 37, 22; C. 5, 71, 13; D. 27, 9, 5 § 14; C. 5, 71, 12.

82. D. 27, 2; C. 5, 49; and see *Glück*, "Commentaries," Vol. 30, p. 217.

more positive evidence above cited, pass it by as something rather anomalous.⁸³

Article 407 is general in scope, and provides that the guardian represents his ward in all legal transactions.⁸⁴

In Article 408 certain transactions are prohibited absolutely to the ward, among which are donations (in the English sense). These were also void at Roman law, and could not be made even with a court's sanction.⁸⁵

Second Section: The Office of Curator.

Third Section: Co-operation of the Guardianship Officials.

Fourth Section: Responsibility of Guardianship Officials.

These sections contain only local provisions.

TWELFTH TITLE: THE END OF THE GUARDIANSHIP

First Section: End of the Wardship. That guardianship resting on minority should cease therewith is not particularly startling; and that Swiss law⁸⁶ and Roman law⁸⁷ contain the same provision does not surprise us.

Second Section: End of the Guardianship. From the side of the guardian the relation with his ward is terminated: as is enacted by Article 441, when he becomes incapacitated;⁸⁸ as in Article 442, by expiration of the term for which he was appointed;⁸⁹ and as is found to be the case at Roman law, where the guardian is dismissed from office.⁹⁰

Third Section: The Consequences of Its Termination. As at Roman law, the end of the relation of guardian and ward brings with it⁹¹ the duty to render a final account.⁹²

Articles 454-455 are quite interesting in so far as they distinguish the different kinds of errors in this account and the prescriptive periods for each.⁹³

[To Be Continued]

83. See, however, for the Roman distinction, Inst. 3, 19 (20), §§ 9-10.

84. That this is the position of Roman law, see *Mackeldey*, § 614.

85. See C. 5, 74, 3.

86. Art. 431.

87. Inst. 1, 22, pr.; C. 2, 45, 2.

88. The Roman rule is similar where a loss of freedom or citizenship occurs: see Inst. 1, 22, 4.

89. See Roman rule in Inst. 1, 22, 2, 5; Inst. 1, 21, 3; D. 27, 1, 10, § 8.

90. See Inst. 1, 22, 6 for the same Roman rule.

91. Art. 451.

92. See D. 27, 3, 4, pr.; C. 5, 37, 14.

93. For the same Roman distinction between 'error computationis' and 'error quantitatis,' see *Glück*, "Commentaries," Vol. 32 pp. 208, et seq.

EFFICIENT ADMINISTRATION OF JUSTICE

BY NATHAN WILLIAM MACCHESNEY¹

We have had a decade of growing interest in the administration of justice, of study and investigation, and of most illuminating experience in various jurisdictions. There is today every indication that we stand on the threshold of great changes; of the acceptance of principles which have been tested and found to be true to the core.

Abundant reasons for all the defects now rightly chargeable against the courts—for delay, undue cost, for frequent miscarriage of justice, for too many appeals, too many reversals, and too many retrials, for mechanical rules, for dissipation of authority and responsibility, for undermining judicial power—are disclosed by analysis of the administration of justice in various states and cities.

As population has increased the number of courts and judges has been multiplied, until a veritable judicial jungle exists in the more populous states. The numerous judges, who in the aggregate are charged with the duty of administering justice, are effectually prevented from consulting together concerning their problems of administration, from co-operating, from acting together. They are even prevented from knowing what the entire problem is. Ours is an exceedingly complex and unwieldy judicial establishment, not deserving at all to be called a system.

As no statistics of performance are gathered and published (with rare exceptions) the bar and the public have no means of gauging the approach to, or recession from, an ideal performance. The result of this obscurantism is, on one side, an entirely unjustified criticism and an unwise set of reform proposals; and on the other side an equally unjustified and fulsome praise of a decrepit system.

But as the result of experiments in various American jurisdictions, and a study of judicial administration among other self-governing peoples, certain principles have been deduced.

[1. Former president of Illinois State Bar Association; member of Chicago bar. This paper is an address by Col. MacChesney before the Illinois State Bar Association at a recent meeting at Springfield in honor of the members of the Illinois Constitutional Convention.—Ed.]

It is now very generally accepted that the almost universal American custom of relying upon the legislature to develop procedural rules is harmful, since it results in legislation to serve private interests, in inexpert and inconsistent procedure, and deprives the judges of responsibility for their product.

It is also as clearly established that the administration of justice is, from the standpoint of the state, a unified function. That is to say, the law of the state is a single body of law. Its enforcement is a single function, though necessarily entrusted to a number of judicial officers. It follows that the judges should constitute a unified and single body, so that each will have a joint and singular responsibility for the discharge of vital duty.

Dr. Roscoe Pound, formerly of Northwestern University, and now dean of Harvard Law School, has recently said:

"We have a series of slot-machine tribunals from which to draw out decisions or precedents from time to time as facts are put in by litigants. We have prosecuting officers. But we have no judicial department, organized as such, and no true department of justice."

The organization of the judges to equalize their work, to permit of co-operation between them, to allow each of them to perform the kind of judicial work for which he is best qualified, to classify the kinds of judicial work, is the soul of the unified court idea, which is accepted throughout the country as the cornerstone of judicial reform and integration.

The principle is concisely expressed in the American Bar Association canon adopted in 1909:

"The whole judicial power of each state should be vested in one great court, of which all tribunals should be branches, departments, or divisions. The business as well as the judicial administration of this court should be *thoroughly organized* so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public."

A state or metropolitan judiciary properly organized becomes at once an effective piece of political machinery for accomplishing the work for which it was created. The mere business side of administering justice throughout a state under modern conditions is an exceedingly complex and involved matter. We have, for instance, in Cook County, over seventy judges of courts of record, a working force of five or six hundred clerks and process servers, and about twenty well established classifications of causes in the field of civil, criminal, and quasi-criminal law.

To expect economy, expertness, and a fair distribution of work between the judges without some measure of co-ordination and plain business management is of course out of the question. It is plain, and our experience clearly proves, that with any given body of judges the relative degree of efficiency attained will be very closely related to the degree of co-ordination and business management which is provided.

Because we have had in Cook County a considerable degree of business management, we have been able to get along; that we have not had complete unification and appropriate management explains the waste and confusion, the delay and imperfections which have been all too apparent. The lack of unity in the field of criminal law administration, more than any other factor, accounts for the outrageous and shameful failure of Chicago to protect its law-abiding citizens from murderers and thieves.

It is urged that not all of our judges are competent and faithful. But we cannot hope, even if this were true, to make any sweeping change, especially by merely legislative formulae. We must take our judicial staff as it is, and create the most favorable environment for it which is possible. We can then better agree upon this proposal because we know that the best staff of judges which any community ever had, could not achieve anything like maximum efficiency, unless so co-ordinated as to permit of the elements of good business management, of classifying the work, of keeping adequate records, of utilizing each judge in the field for which he is best qualified by training, experience, and personal aptitude.

We need to restore to our courts and judges a larger measure of power to dispense justice, in order that they may as judges be held responsible for results; but unless and until an organization is created which defines the duties and relations of all these judges, we dare not increase their judicial powers. It is an historical fact that their powers have been sapped because of the lack of responsible organization and consequent irresponsibility.

The main question in improving the administration of justice through constitutional change becomes then the question of what kind of organization is best. As to this, there is considerable experience available, both in America and in foreign courts. To take a body of specially trained men and work out a simple form of organization is not difficult in the commercial or industrial world, and should be no harder in the judicial field. In fact, there is no reason why the principles which make for unity of purpose, for individual freedom, for mutual and personal responsibility which

ten thousand times over have worked successfully in banks, in manufacturing concerns, and in transportation lines, should not yield good results in judicial administration.

Take the situation in Cook County. The first need is to classify the business, first into a few main channels, and then into various sub-classes. A division or department should exist for each main classification. The following simple division of the business would doubtless suffice:

1. Chancery Division.
2. Civil Jury.
3. Civil non-Jury.
4. Criminal.
5. Probate, Divorce, Domestic Relations, and Juvenile.

There might also be an appellate division, depending upon the nature of the state organization.

Let all of the judges of the county be assigned to these divisions, according to previous training and attainments. Then within each division let there be special branches as indicated by the nature of the work. And let individual judges be assigned to these special branches. That affords for the first time specialist judges, the great need of our times, since our substantive law has become so highly diversified.

Under this plan each judge becomes personally responsible for a clearly seen portion of the entire work. If it is attempted to do all this by constitutional or statutory enactment, a rigid and worthless machine would result, intolerable to the judges and sure to result badly. It is because until recently all our provisions for judicial administration have been mechanical and rigid that our field for experiment was so narrow, and results so barren in most jurisdictions.

There must be in any department of government a continuing authority with power to adapt the machinery to constantly changing conditions. The assignment of judges must be the conscious act of some authority within the judiciary. It can never be a final and completed act. There must be freedom to shift judges from one kind of work to another in order to equalize the burdens, to keep for all time the square plug from the round hole, *to avoid monotony*, and to keep the personnel fresh, vigorous, and ambitious. These reassignments must be made at all times with due attention to the underlying principle of developing the specialist judge, because through specialization is expertness and efficiency to be attained.

The classification of business and assignment of judges within each fixed division of the unified court calls obviously for a presiding judge for each division. These presiding judges together will naturally constitute the executive board or judicial council which will be charged with the administration of the entire court through the making of rules and orders, and especially the direction of the body of ministerial agents. This board or council will need an executive to preside over its deliberations and to see that its policies are carried out. For lack of a better designation, let this head of the council be called the chief judge, or chief justice.

Here we have the simplest possible form of organization. It is so simple that when the presiding justices of divisions are in session as a council, the entire court, with its five or more divisions and thirty or more branches, is completely represented, and when these presiding justices are at work with their colleagues in the various divisions, the judicial council has a representative in every main department.

Can there be doubt for a moment that such simple but effective organization would not almost immediately revolutionize the administration of justice in Cook County? Order, economy of effort, accurate records, promptness, expertness, would at once supersede all the confusion and waste of the present condition.

Specialist judges, expertness, individual responsibility, and an equal distribution of work are just as much needed throughout the state as in the metropolis, though their lack has not been so severely felt. The problem of organization throughout the state is not greatly dissimilar. If there is to be conscious direction in respect to classification of work, there must be territorial divisions of the circuit court. We have such districts now, in the form of seventeen circuits. But fewer and larger districts are needed. Somewhere from five to ten districts or circuits would be convenient, each with its local presiding justice with powers of assignment and control over dockets and calendars. These presiding justices should be members of the state judicial council, charged with the rule-making power for all the courts of the state, and with the general superintendence of the entire work of administering justice. The state judicial council should have other members, representative of the Cook County unified court and of the court or courts of appeal. It thus becomes a representative body, empowered to perform the administrative and the quasi-legislative work of managing the state judicial department. By the same token the state is given for the first time a genuine judicial department, with definite powers and

definite responsibilities, in place of the slot-machine tribunals of the present regime.

There are three main functional divisions in the judicial field, namely :

1. Administering justice in local tribunals of limited jurisdiction.
2. The trial of causes of all kinds in courts of general trial jurisdiction.
3. Appellate work.

It would be entirely consistent, and in accord with successful practice, to base the state judicial organization on this three-fold functional basis. That is to say, have a court of limited jurisdiction for every county, a single circuit court for the entire state (of which the unified Cook County court would be an integral part, though possessing a specially developed organization), and a single court of appeal.

In the two draft proposals now before the Constitutional Convention the position is taken that inferior courts should be done away with in every county, as well as in Cook County. The question thus stated is one which should not stir up much antagonism. We know that a properly organized county court, with active supervision of magistrates, can be highly successful. It may be that equal efficiency can be obtained from a body of circuit court judges and assistant judges. It may be noted, however, that to wipe out the local judges of limited jurisdiction and create a force of assistant judges, is likely to be a mere beating of the devil about the bush. Whether it can be made to work well will depend entirely upon the question whether an active, continuing, responsible authority is created to keep in touch from day to day with all these judges and assistant judges. If there be such continuing supervision, there will be complete success under the plan proposed. But if administration is dependent instead upon a body of rules, whether statutory or whether rules laid down for the entire state by an overworked body of Supreme Court judges, there will be that impersonal and mechanical operation which always and everywhere produces waste of energy, of time, and of money.

As long as our Supreme Court justices are chosen from districts it is but fair that Cook County should have a larger representation upon the court, because Cook County furnishes more than half the cases heard by this court, and many of them involve facts peculiar to metropolitan conditions of living and transacting business. But there is no other reason for the proposed increase in the number of Supreme Court justices. From the standpoint of

efficiency the court will lose, rather than gain, by increased membership unless it is permitted to perform at least part of its work in sections.

A reviewing court of large membership must necessarily work in divisions, or deliver but a limited output, or else drift into the objectionable practice of the one-man opinion. The proposals now urged in the convention are calculated, for the mere purpose of creating two additional places on the Supreme Court, to reduce the work of the court, or to accentuate the unfortunate tendency toward the one-man opinion; this because the concurrence of five justices is required.

The present court prefers not to work in divisions. But that is not adequate reason for so wording the constitution as to prevent the use of this system for all time. The organic law should at least be permissive as to this, and not tie the hands of future judges. Judges who are trusted with the great powers of the Supreme Court should be trusted with such a small matter of administrative detail. It is recommended that the provision be made to read as follows:

"The Supreme Court shall have power to sit in (two) divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of certain cases by the whole court."

Illinois has gotten along better than most of the more populous states in the matter of appellate jurisdiction because there has been a considerable measure of unification between the Supreme and appellate courts. This has sprung from the fact that the appellate court judges are chosen by the Supreme Court. The two tribunals enjoy considerable administrative co-ordination and this has prevented to some extent the costly and unjust delays observed in other states which have two courts of review.

The logical step at this time is to further unify the appellate function by merging these two courts with all offices. There should be but a single appeal in any cause, with provision for a determination by the Supreme Court, as a central and superior authority, sitting in banc, in certain classes of cases. This would greatly lessen the costs of appellate practice, shorten the time involved, make this onerous work easier for the justices, and in every way garner the benefits of genuine unification.

The principles of developing procedure through rules of court, of co-ordinating judges for co-operative and economical work, of specialization through assignment to special calendars, of continuing

day-by-day direction to the single end of securing a maximum product of the highest quality from our judges—all these principles are implied by the term "unified court." The proposals now before the convention, which are sponsored by the most responsible and respected judges and practitioners, go a considerable distance along the road of unification. They organize the judiciary. Whether they go far enough to accomplish what is desired, and whether the organization so provided is the best organization, is open to debate. They both assume that whatever of direction is to exist in this great department is to flow from the Supreme Court. In making the Supreme Court responsible for the operation of all the courts of the entire state, they are greatly increasing the duties and responsibilities now resting upon shoulders that are overburdened.

Among the uninformed and unprogressive the objection is sure to be raised that a dangerous concentration of power is established. While my objection to the plan is founded on practical, rather than theoretical grounds, I must say that it will not be an easy matter to disabuse minds of such a fear in view of our historical tradition and habit of distributing power.

I favor most heartily the principle of developing the judiciary into a real department of state with the power to initiate at least its own rules of administration. This would be a further step in the work of Governor Lowden in the creation of administrative responsibility in Illinois. This must be done if we are ever to make our courts the real agencies of progressive democratic government. But for strictly practical reasons I greatly prefer to see the powers of administration centered in a council of judges representative of the various departments of the unified state system, rather than in the Supreme Court, which has great and consequential duties and responsibilities of an even more exacting nature, and a very different nature.

It is a short step, if we are to develop any plan at all of continuing direction, to provide the judicial council. But suppose this is objected to as a dangerous concentration of power? The answer is simple. It is this: That the publication of judicial statistics and the holding of meetings of judges are complete democratic checks upon the misuse of administrative power. Statistics hold the judges up to a constantly rising standard of achievement. Meetings serve two great purposes—they afford opportunity for litigants and lawyers to voice their complaints and secure redress, without danger of flarebacks, and they give opportunity for the opinions and the

ideals of the more conscientious and more ambitious judges to dominate the institution and become the opinions and ideals of all.

The publication of statistics and the holding of meetings of judges are necessary to the efficient operation of the courts, as such publication and conference are necessary to the efficient operation of any other branch of government or any great private business. Just think of it! The only field in which there is not complete recording and reporting is the field of judicial administration. Here all has been darkness, mystery, guesswork.

Most of our judges are highly industrious. Some few are shirkers. One judge in Cook County, when assigned to appellate court work, put his feet against the radiator, smoked a cigaret and stated he would write no opinions. He had his way. In a responsible court his refusal to function would have been impossible. Co-ordination and the equalizing of burdens will benefit both types. If the new constitution provides for such equalizing and provides the natural and necessary checks of publicity and co-operation between judges, the attacks on the ground of dangerous powers will be successfully answered, because we have ample experience to draw upon.

Both the Bar Association and the Miller drafts provide a single executive head for the unified Cook County Court. Neither provides for departmentalizing. Prof. Herbert Harley of Northwestern University Law School, an honorary member of this association, says:

"I submit that we have moved beyond such crude organization. Such a skeleton formation will not satisfy the friends of the unified court principle, and will alarm all the rest of the community. Two or three sections providing for departments, for a council of judges, and placing limitations upon the power of this chief executive will insure good results and give the friends of progress something to champion, as well as disarm criticism. If any substantial powers are conferred this proposed single executive will be a highly important figure in the system. If his powers are limited to prevent abuses, he will be a mere figurehead.

"The Bar Association plan apparently expects that he shall be a figurehead, for, in the face of the gigantic task of directing a court of over sixty judges, it provides that the chief shall be chosen by the judges themselves from among their number. Such an executive will be a man of straw."

The half-way measure that endeavors to satisfy progressive members of the bar and not wholly displease those who have vested

interests in slovenly and inefficient administration and injustice will have few champions to save it from defeat. Better win the hearty support of one side or the other, since now the issue has been defined between progress and reaction, between justice as good as it can be under human institutions and justice shackled and humiliated.

THE HOHFELD SYSTEM OF FUNDAMENTAL LEGAL CONCEPTS

BY ALBERT KOCOUREK

Wesley Newcomb Hohfeld, late professor of law in Yale University, was widely known among his professional colleagues as a successful teacher and a keen analyst of legal problems. Such attributes in fair measure are a necessary part of the equipment of those who conduct the rigorous schedule of the present-day law school. But Professor Hohfeld achieved fame in a field other than that of teaching. He lived to realize the unique distinction of seeing his system of jural concepts accepted as a body of official classroom doctrine at the institution of learning, where later a wretched fate struck him down in the midst of his constructive proposals and while he was still in the flower of his mental vigor. Had he lived yet a while, he would have seen his jural analysis carried to, and established at, another famous seat of legal scholarship by a generous and competent associate. He would have seen an important revision of a well-known text-book based upon it.¹ He would have found a recent case-book making tacit acknowledgment of the value of his system.² Likewise, he would have been gratified, as well he might, to discover his analysis accepted by various law teachers, as shown by miscellaneous writings in American law reviews of recent months.³ Lastly, had he lived, he would have experienced the satisfaction of finding an interest in his ideas unequalled perhaps by any single contribution to legal science in America within the last twenty years.

In venturing to discuss the Hohfeld System, and at various points to urge serious objections to it, the present writer is tardily responding to a wish which Professor Hohfeld himself, about a year before his death, did him the honor to express, that he make a formal statement of his views. The writer need not say that these comments, the substance of which he had already, though crudely and ineffectually, attempted to convey to Professor Hohfeld, go with a sense of regret that they cannot in their present form meet

1. Prof. *Arthur L. Corbin's Anson, "Contracts"* (3d Am. ed.), Oxford U. Press, 1919.

2. *Bigelow, "Cases on Rights in Land Including Introduction to the Law of Real Property,"* St. Paul, 1919.

3. See, especially, *Yale Law Journal*, XXVI, et seq.

the eye of that acute thinker, who, notwithstanding sharp difference of opinion, would have been liberal enough not to misinterpret them as other than testimonials of professional and personal esteem. For the rest this discussion lies under no restraint, since the contribution attempted by Professor Hohfeld is important enough to be depersonalized. Furthermore, the inheritance has, as already observed, found 'cretio' in 'heredes voluntarii' who are well able to defend it.

First of all, Professor Hohfeld's celebrated table of jural relations must be reproduced.

JURAL OPPOSITES	(1)	(2)	(3)	(4)
	Right No-right	Privilege Duty	Power Disability	Immunity Liability
JURAL CORRELATIVES	(1)	(2)	(3)	(4)
	Right Duty	Privilege No-right	Power Liability	Immunity Disability

I

Among the merits of Professor Hohfeld's System⁴ are the following:

1. It was the first attempt at a complete systematic arrangement of jural relations. A half-dozen or more Germans had already treated in a thorough way the active (power) side of jural relations. The most complete of these attempts was that of Bierling,⁵ but no writer in any country, prior to Hohfeld, had sought to give a systematic account, with suitable terminology, of the passive side of jural relations. Partial efforts to state the correlatives (the active and passive sides of jural relations) had been made by Terry⁶ and Salmond;⁷ but the table of opposites is altogether a novelty—whether useful or not we shall have occasion to examine.

2. It made manifest, as never before, the great complexity of jural threads found in concrete legal relationships. The usual method of legal operation and of legal thinking lies in the realm of

4. In making reference to Professor Hohfeld's system, we shall for convenience make use of and cite the pamphlet entitled "Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays," by Wesley Newcomb Hohfeld, New Haven, Yale U. Press, 1919, which contains the two principal expositions of his system together with an introduction by Prof. Walter Wheeler Cook, all reprinted from Yale Law Journal, Vols. XXIII, 16 (*Hohfeld*, 1913); XXVI, 710 (*Hohfeld*, 1917); XXVIII, 721 (*Cook*, 1919).

5. "Kritik der juristischen Grundbegriffe"; "Juristische Principienlehre."

6. "Leading Principles of Anglo-American Law" (1884).

7. "Jurisprudence" (1902).

molar physics, where often qualitative analysis instead is demanded. Without trenching on the medieval debate of nominalism and realism, it is clear enough that where words are lacking, ideas are usually wanting. Confusion of all jural relations under one undifferentiated idea, 'rights,' cannot but result in inaccurate thinking, and, as likely as not, occasionally, in incorrect legal solutions. The chief attribute of scientific progress is greater clearness of distinction. In this the law has been the most backward of sciences, and it is really astonishing, when one stops to consider the fundamental importance of ultimate categories in legal reasoning, that the insufficiency of our technical apparatus, in a scientific sense, had not long before impressed itself.

3. It made conspicuous the uniqueness (singleness) of jural relations as existing only between two persons, and never more than two persons.⁸ The confusion which existed on this point was disastrous in cases of rights in personam involving correal or solidary obligations. Nothing in Hohfeld's System points more clearly to the sharpness of insight of Professor Hohfeld and his colleagues than this important and necessary distinction.

4. It gave to the concept 'liability' a new and useful extension, which includes advantage as well as detriment.⁹ A certain "linguistic contamination" adheres to the term 'liability' which a layman might find it difficult to remove, but in legal science this may readily be ignored. The utility of a two-sided correlative to power as a juristic fact seems indispensable, and no substitute probably could be found without a Benthamic coinage which would require for its establishment two or three generations of insistent repetition.

II

We now pass to what we regard as the demerits of the system.

1. The table of jural 'opposites' (a) is in part inconsistent, and (b) it has little, if any, juristic utility.

8. Prof. *Corbin* has especially emphasized this point: "Legal Analysis and Terminology," Yale L. Jour., XXIX, 165.

9. Prof. *Corbin* has especially emphasized this point: "Legal Analysis," Yale L. Jour., XXIX, 169; cf. the remarks of Dean *Pound*, Int. J. Ethics, XXVI, 92 (97).

This enlargement of the term liability is necessary not in jural relations proper which involve fundamentally the idea of constraint, but only for the broader use of the concept juristic fact, a distinction entirely disregarded and probably misapprehended in the Hohfeld System.

It may here be noted that while Prof. *Hohfeld* ("Fund. Concepts," p. 16) and Prof. *Cook* (id., p. 7) clearly employ 'power' with both an abrogative and a constitutive function, Prof. *Corbin* in a recent statement issued with

(a) It is inconsistent. But what is an opposite? It is said "that when dealing with jural opposites we are looking at two different situations from the point of view of the *same person*."¹⁰ So far, so good. But there is still a difficulty. In logic, *opposites* as distinguished from *contradictories* are the extreme terms of *quantity*. Thus $+a$ is the opposite of $-a$. In the case of legal relations to have a claim to payment of \$100 would be the opposite of a duty in the same person to pay \$100. Yet we find in Professor Hohfeld's table that the 'opposite' of 'right' is not 'duty,' but 'no-right.' Now it is clear that 'right' and 'no-right' are not 'opposites'—at least not in the sense of logic—but are rather 'contradictories' (negatives).

The next enumeration of 'opposites' in Professor Hohfeld's table is 'privilege' and 'duty.' Here is a clear change of position, since on the basis of contradictories or negatives (i. e., the presence or absence of a *quality*) the negative of 'privilege' must be 'no-privilege' and not 'duty.' Professor Hohfeld's illustration at this point will be useful—

" . . . whereas X has a *right* or *claim* that Y, the other man should stay off the land [of X], he himself [X] has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the NEGATION of a duty to stay off."¹¹

The term 'privilege' is used here apparently in the sense of 'liberty,' a non-jural concept, as we think; but the true negative of 'liberty' is 'no-liberty,' just as the negative of 'right' is 'no-right.'

(a) The field of 'liberty,' so far as it is connectible with anything of jural consequence, is limited to the enjoyment of the things for which rights and powers exist. Liberty cannot be predicated of rights and powers themselves since they denote another group of ideas. What 'liberty' can the holder have in a chose-in action? Yet there is a duty. It is clear that not every duty is the 'opposite' of a liberty, as any right in personam suffices to demonstrate. It may be possible to speak of a *possessio iuris* of rights in personam

collaboration of his associates, seems to limit 'power' to the function of creating "new legal relations" ("Legal Analysis and Terminology," Yale L. Jour., XXIX, 168).

10. "Fund. Concepts," p. 10, n. 13.

11. Id., p. 39. Note the term 'negation' (not emphasized in the original). Cf. note 29, post, where Prof. Corbin has substituted for 'privilege'—'duty,' the terms 'no-duty'—'duty.' As to this substitution, while it has the effect of making the table of 'opposites' consistent on the basis of contradiction, it may be objected, that 'privilege' in the sense of 'liberty' is not the same idea as 'no-duty' (cf. note 28, post).

which are susceptible of continuing exercise (e. g., the right of an annuitant), but even in this case it is an awkward locution to say that the right-holder has the 'liberty of exercising his right.' (b) Again, the liberty of the owner of land to go on his land might stand 'opposite' a contractual duty in the same person not to stay off the land, but to go on it. (c) Furthermore, the liberty of an owner of land to go on his land might stand 'opposite' his equal liberty to stay off his own land. Liberty to stay off the land is just as much an 'opposite' of liberty to go on the land as is the duty to stay off. These illustrations are put to show that 'privilege' (liberty) and 'duty' are neither true opposites nor negatives, and that this division is wanting in logical coherence. The real negatives are 'privilege' (liberty) and 'no-privilege' (no-liberty).

The next category ('power'—'disability') seems unobjectionable from the standpoint, not of 'opposites,' but of 'negatives,' since 'disability' is simply another way of saying 'no-power.' Likewise, and for the same reason, the last category ('immunity'—'liability') is formally consistent, since 'liability' is only a final statement of the effect of 'no-immunity.' If there is 'no-immunity,' necessarily there must be 'liability.'¹²

Since the table is inconsistent in one term regarded by Professor Hohfeld as fundamental, it might be supposed that the learned author was dealing neither with 'opposites' nor with 'negatives' (contradictories), in the application of logic, but with a third term, 'contraries,' in the sense that a wrongful act is the contrary of a duty, or in the sense of the 'contrarius actus' of Roman law; but without prolonging the discussion at this point, a cursory examination of the table will show that this possibility is not borne out. Moreover, the scope of 'contraries' as applied to jural concepts is very limited.

(b) It has little, if any, juristic utility. Since jural relations must be completely isolated and identified, it is of no profit to know that 'no-right' is the negative of a 'right.' (a) One may have 'no-right' and yet occupy an important jural position. For example, he may have a jural power (e. g., power of appointment). The thing of importance is to isolate and identify the power, in the example given, and not to determine that a jural power is a 'no-right.' (b) Again, one might have a 'no-right' because of subjection to duty.

12. On the assumption, of course, of a jural relation, since, if no jural relation exists, the terms are meaningless; e. g., if A is not an owner of land, his position is one of 'no-immunity' without, however, being that of 'liability.'

Professor Schiller has aptly said of contradictories ("Formal Logic," p. 30)—

"The slightest reference to actual thinking . . . shows that the doctrine [of contradictories] carries the use of logical figments beyond the limits of the tolerable. We never actually use such contradictories. It is not profitable to talk about the universe at large and to contrast a single aspect of it with all that remains. We always know enough about anything we are discussing not to leave its position as vague as that, and hence language does not form pairs of words in the form of 'A' and 'not-A.'"

Contrasting a definite legal concept "with all that remains" is only a step from contrasting a quality outside the field of reference with something in the field of reference by application of the 'law of excluded middle.' Thus we might say that particular legal concepts are either colloidal or not colloidal, isosceral or not isosceral, ponderable or not ponderable, etc., etc.

To have known Prof. Hohfeld is to understand the table of 'opposites' (contradictories). His type of mind was the thorough-going kind. If he met a fact, he did not stop to inquire if it had any exchangeable value. We do not quarrel with that mental attitude. On the contrary, we highly respect it, and we simply affirm that as to the table of 'opposites' (contradictories) we are unable to find any place where it may be usefully applied in concrete legal thinking. It is not improbable that Prof. Hohfeld in his reflection on the subject weighed the possibility of constructing still other tables, as, for example, a table of 'opposites' (logical sense), of 'contraries,' and perhaps even of 'differentials,' and since nothing of such additional tables was announced or suggested by him, it is very likely that he regarded the two tables published as a complete statement of fundamental jural ideas so far as concerns the problem of systematic arrangement.

If the fundamentum divisionis is 'opposites,' in the logical sense (i. e., extreme terms of quantity), so far as it is workable, we fare no better. That a right in this sense is the opposite of duty is a matter of accounting rather than of jurisprudence. If 'contraries' is taken as the basis of division, it will be found that its range of application is too limited for practicality in a systematic table.

Coming back, therefore, to the table considered as based on 'negatives' (contradictories), which is the only view which will avoid a complete breakdown), and not on 'opposites' or 'contraries,' we conclude that it has little, if any, importance, and that if it seems

desirable to retain it, its partial inconsistency should be adjusted upon a logical foundation. Other objections to the terms 'privilege' and 'immunity,' as applied by Professor Hohfeld, are reserved.

2. A number of other suggestions may be grouped.

Professor Hohfeld avoids definition as "always unsatisfactory, if not altogether useless."¹³ His repugnance to definition was the lawyer's instinct long ago expressed by Iavolenus: "Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset."¹⁴

He did not have in mind, it is fair to assume, the objections to formal definition raised by non-Euclidian geometry and by non-Aristotelian logic. It is pretty certain that spherical triangles, parallel lines which meet, and four-dimensional space were not the restraining ideas of his refusal to provide a system of definitions; but it may be noted that the philosophers and logicians who argue for pluralistic definitions and relativity agree on the acceptance of provisional definitions as data without which the processes of judgment and inference cannot proceed. But if Professor Hohfeld has declined to define his terms, assuredly he has made it necessary for others to attempt it, if they would have any hope of understanding his proposal.

When we come to the table of 'correlatives,' we are as unenlightened as to what is meant as when the table of 'opposites' was encountered. Here we believe half of his table will be found logically consistent. The exceptions are 'privilege'—'no right' and 'immunity'—'disability.'

The concept 'correlative,' as used by Professor Hohfeld, is clearly intended as that derived in formal logic from 'absolute' and 'relative' terms. Correlatives are those objects or ideas of objects which are necessarily connected with other objects or ideas of objects; thus, 'father' is a relative term and 'son' is the correlative. As to this distinction, Mr. Schiller has remarked that it is "wise of formal logic not to enter into such questions as why the 'correlative' of 'son' should not be 'mother.'"¹⁵ In the light of this objection, 'wrong' would be as much a correlative of 'right' as is 'duty.' But it is allowable for each science to construct its own definitions, and a slight amendment of the definition of formal logic will avoid objections which have been raised in the newer functional logic to this category of terms. We may say, for the purpose

13. *Id.*, p. 36.

14. D. 50, 17, 202: *de reg. iur.*

15. "Formal Logic," p. 28.

of jurisprudence, that a correlative term is that of an idea which is necessarily connected, and is consistent, with another idea.

With this addition, we find no objection to 'right'—'duty' and 'power'—'liability' as correlatives. These combinations of correlatives are fairly well established. But again, so far, so good; for when these terms are inspected in detail, it will be found, unfortunately, that occasionally the meaning is obscured by inconsistent or double usage in the Hohfeld School.

A quotation taken from the more recent of Professor Hohfeld's essays¹⁶ on this topic and which may be accepted as representing his maturest views, is as follows:

"Suppose . . . that A is fee-simple owner of Blackacre. His 'legal interest' or property relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. First, A has multital legal rights [rights in rem], or claims that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties.

"Second, A has an indefinite number of legal PRIVILEGES of entering on the land, USING THE LAND, HARMING THE LAND, ETC., that is, within the limits fixed by law on grounds of social and economic policy, he has PRIVILEGES OF DOING ON OR TO THE LAND WHAT HE PLEASES; and CORRELATIVE to all such legal privileges are respective LEGAL NO-RIGHTS of other persons.

"Third, A has the LEGAL POWER TO ALIENATE HIS LEGAL INTEREST to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person;¹⁷ also the legal power to create a life estate in another and concurrently to CREATE A REVERSION IN HIMSELF; ALSO THE LEGAL POWER TO CREATE A PRIVILEGE OF ENTRANCE IN ANY OTHER PERSON BY GIVING 'LEAVE AND LICENSE'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons—this meaning that the latter are subject *nolens volens* to the changes of jural relations involved in the exercise of A's powers.

"Fourth. A has an indefinite number of legal IMMUNITIES, USING THE TERM 'IMMUNITY' IN THE VERY SPECIFIC SENSE OF NON-LIABILITY, OR NON-SUBJECTION TO A POWER ON THE PART OF ANOTHER PERSON.¹⁸ THUS A HAS THE IMMUNITY THAT NO ORDINARY PERSON CAN ALIENATE A'S LEGAL INTEREST OR AGGREGATE OF JURAL RELATIONS TO ANOTHER PERSON; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person, X, shall not enter on the land, or, in

16. "Fund. Concepts," p. 96. The italics are the author's; the small capitals for differentiation are the present writer's.

17. Here is a clear example of the confusion of a 'power' considered as a juristic fact with power considered as a jural relation.

18. Overlooking the more important function of 'immunity' in a jural relation; e. g., immunity from an illegal levy on exempt property.

other words, create in X a privilege of entering in the land. CORRELATIVE TO ALL THESE IMMUNITIES ARE THE RESPECTIVE LEGAL DISABILITIES OF OTHER PERSONS IN GENERAL."

The correlatives, 'right'—'duty' and 'power'—'liability,' are well-seasoned and they are not questioned. We have already pointed out that Professor Hohfeld has given the term 'liability' a wider meaning than that which prevailed, and this extension we regard as original and useful, at least for juristic facts as distinguished from jural relations. Before passing to a discussion of the other two correlatives, some variations of usage may be pointed out.

Professor Hohfeld speaks of "the householder's *privilege* of ejecting the trespasser." This seems a confusion of liberty and power.¹⁹ When one acts for himself without legal consequences, as by walking on his land, he exercises a *liberty*, but when the owner puts a trespasser off the land, it would seem that he exercises a *power*, i. e., he does something which is a *disadvantage to another*.²⁰

A license is regarded as a "particular" kind of 'privilege' (liberty).²¹ Surely there is a juristic difference between what one may do on his own land and what one may do, outside of an agency transaction, on the land of *another*. A license, therefore, is either a kind of power, or it has not been provided for, since as against the owner of the land it cannot be a liberty ('privilege') without doing violence to the ordinary meaning of the term 'liberty,' and, likewise, confusing the non-jural concept of 'liberty' with the jural concept of 'power.'

A constable is said to have a "privilege" of killing dogs without collars.²² This also is a power and not a mere liberty. Professor Cook says of privileged defamation that "the person publishing the same has a *privilege* to do so."²³ The present writer agrees that 'privilege' is the right word, both in lawyers' parlance and in jurisprudence, but submits it is the wrong word in the Hohfeld System,

19. "Fund. Concepts," pp. 33, 41, n. 39. In like manner, Prof. Cook speaks of the "privilege of self-defense": *id.*, p. 6; see, also, Prof. Corbin, "Legal Analysis," Yale L. Jour., XXIX, 167-8.

20. We have already pointed out that Prof. Corbin seems to limit power to a constitutive function (see note 9 *supra*). Perhaps this accounts for the difficulty of applying the term 'power' in these cases. Whatever the explanation, the Hohfeld System would in no way need modification if 'power' were used in the double sense of abrogative as well as constitutive function. In such case, the person against whom the 'power' prevails is subject to a 'liability' and not a 'no-right' as the use of 'privilege' necessarily requires in the Hohfeld System.

21. "Fund. Concepts," p. 50.

22. *Id.*, p. 41 n. 39.

23. *Id.*, p. 7.

where 'privilege' means 'liberty,' unless 'power' and 'privilege' overlap, in which case it will become necessary to register another quite obvious objection.

Professor Cook also speaks of the 'privilege' against self-crimination,²⁴ and he seems also to say²⁵ that this 'privilege' is a 'right' *stricto sensu* and also an 'immunity.' The same observation above made may be here repeated so far as the capacity against self-crimination is regarded as a 'privilege.' It may be further objected, if Professor Cook has not been misunderstood, that it is a curious situation that the same jural situation can be at once a 'privilege,' a 'right,' and an 'immunity.' If so much diversity of jural aspect is possible in the Hohfeld System, it is patent that the System needs reduction to Professor Hohfeld's ideal, the "lowest common denominators."²⁶

These few illustrations may suffice to show either inconsistency in the use of the terms 'privilege' and 'power,' or, in the alternative, an apparent overlapping which needs explanation. We now pass to a brief consideration of the validity of the two groups of correlatives denominated 'privilege'—'no-right' and 'immunity'—'disability.'

'Privilege,' in the sense of liberty, does not seem to be a relative term at all, but, on the contrary, an absolute term. There is no more of 'relation' in 'privilege' than may be found in a windmill or a table. True enough, the term 'correlative' is indefinite at best, but it is clear that the correlation, if any, of liberty in one person and the non-existence of rights as to the content of it, in another, is juristically quite a different sort than that of 'right' and 'duty.'

(a) Without attempting here a refinement of distinction which more properly falls to the expert logician, it is enough to point out that 'no-right' is not any more entitled to be considered *the* correlative of 'privilege' than is 'no-power.' (b) Again, the correlatives 'immunity'—'disability,' for the same reason and for an additional reason, are objectionable. The additional reason is that the correlation is not complete. The person under disability may lack legal power (which is the sense in which the term disability is used in the Hohfeld System,²⁷) but may there not be a disability, also, because of the existence of duty?

24. *Ibid.* See also Yale L. Jour., XXVIII, 387 (391).

25. *Id.*, p. 7 n. 3.

26. *Id.*, p. 64.

27. *Id.*, pp. 96-97; Corbin, "Legal Analysis," Yale L. Jour., XXIX, 170.

The difficulty of this table proceeds from the erroneous view expressed by Prof. Cook that "each concept must therefore as a matter of logic have

3. Like the table of 'opposites,' the category of 'correlatives,' 'immunity'—'disability,' is a novelty. While it is logically incomplete, as it seems to us, in not including under disability the presence of duty as well as the absence of power, it may be objected to for the more important reason that, as limited, it is juristically of no consequence.

'Immunity,' if it means anything at all of importance, is immunity from *something*; but, in Professor Hohfeld's System, an immunity is an immunity from *nothing*. One would hardly be considered immune in any practical sense from a disease which has never existed and which will never come into existence. Likewise, in the law, what has never existed and never will exist is not worth consideration either by lawyers or jurists.

The category 'immunity'—'disability' is an empty one—it has absolutely no content. It may be conceded that in the administration of justice the question often may be, and is, litigated whether A has the power to divest the title of B. A either has such a power or he has not. If A has the power, we are not dealing with an immunity but with a liability—something real—a positive concept; but if A does not have the power, even though A asserts it, there are blanks on both sides. What, therefore, Professor Hohfeld means to say is that where there is a 'no-power' on one side, there is a correlation of 'no-liability' on the other. This way of stating the matter must, we think, disclose that one nothing opposed to another nothing cannot be regarded either as juristic correlatives, or as having any juristic connection or utility.

The term 'immunity' is well known to the law and we believe it can be usefully employed in a juristic sense, which is reasonably consistent with prevailing professional usage, and it seems to us unfortunate that an effort was not made to incorporate it in a juristic table where its actual fundamental operation would be disclosed. Nor do we deny that it may rarely be convenient to use a negative category of terms to facilitate communication of ideas, as, for example, when we speak of "immunity from prosecution." What we deny is that the terms 'immunity'—'disability' are of fundamental juristic importance in the limited use made of 'immunity' in Professor Hohfeld's System.

4. If the category of supposed juristic correlatives, 'immunity'—'disability,' is a case of blanks on both sides, so it will be found also with the supposed juristic category of correlatives, 'privilege'—a correlative": "Fund. Concepts," p. 10. This is not true in logic, nor is it true in jurisprudence.

'no-right.' This category is another case of negatives with which the law is not concerned in any practical sense except to determine within the scope of litigation that it is not concerned, by merely adjudicating a negative.²⁸

28. Professor Hohfeld in a personal letter (Nov. 19, 1917, citing Pollock, Del Vecchio, and Gareis) showed his understanding of the objection without, however, changing his position: (see Yale L. Jour., XXIII, 16, 42 n. 59; XXVII, 66, 71 n. 12). Likewise, Professor Cook has also clearly apprehended the objection. In the case of *Ind. News Service Co. v. Associated Press*, 39 Sup. Ct. Rep. 68, Mr. Justice Brandeis, in a dissenting opinion thought that relief ought to be denied to the complainant upon considerations which should lead the court "to decline to establish a new rule of law." Professor Cook says of this statement:

"Mr. Justice Brandeis, in holding that the defendant was 'privileged' to pirate the plaintiff's news, was laying down 'a new rule of law' just as clearly as was the majority when they held the defendant was not 'privileged'" (Yale L. Jour., XXVIII, 387 (391)).

To say that a rule of law does not exist applicable to a given case of first impression, according to this logic, is the same thing in jurisprudence as saying that a rule of law does exist. The question, however, is not merely one of words. The real difficulty lies in the failure to understand the nature of a jural relation. A jural relation involves the idea of constraint; so, also, does a legal rule. The *reductio ad impossibile* of the position of Professors Hohfeld and Cook may be shown by the Hohfeld category of 'opposites,' 'right'—'no-right.' A sues B, claiming money due under an alleged contract. The court finds there was no contract, no money due, and consequently 'no-right' in A against B. Will it be argued that A had a 'right' against B before the suit was commenced? Will it be argued that a jural relation was established when the court pronounced a judgment (apart from costs) for the defendant?

Prof. Borchard who has made familiar to us the functions of the declaratory judgment procedure has also asserted the jural character of 'privilege' (liberty). In a recent discussion of *London-American, etc., Co. v. Rio de Janeiro, etc., Co.* [1917], 2 K. B. 611, he remarks:

"It will be observed that the plaintiffs here had no 'cause of action' against the defendants. They merely asserted the defendants' 'no-right' and their own freedom from a duty to share with the defendants the admiralty award (i. e., a privilege)": Yale L. Jour., XXIX, 545.

Prof. Borchard had already made the same point in his discussion of *Guaranty Trust Co. v. Hannay* [1915], 2 K. B. 536, [1918] 2 K. B. 623: Yale L. Jour., XXVIII, 9.

It may be observed that Prof. Hohfeld used the term 'privilege' to include a variety of meanings, as follows:

(1) The 'privilege' of X, the owner of land, to enter on his land: "Fund. Concepts," p. 39. This variation doubtless properly includes also the 'privilege' of *not* entering.

(2) The 'privilege' of a householder to eject a trespasser: "Fund. Concepts," p. 41, n. 39.

(3) The 'privilege' of uttering a libel (e. g., 'privileged communication'): "Fund. Concepts," p. 46.

(4) The 'privilege' against self-crimination: "Fund. Concept," p. 46.

(5) The 'privilege' of entering on the land of another by 'license': "Fund. Concepts," p. 49.

"It has been assumed," Prof. Hohfeld said, "that the term 'privilege' is the most appropriate and satisfactory to designate the *mere negation of duty*" [our italics]: "Fund. Concepts," p. 44.

The views of the present writer may be shortly stated:

(a) The term 'privilege' in the sense of "no-duty" is not synonymous

If A, the owner of a cigar, smokes it in his study, he exercises a liberty, or, in the language of the Hohfeld System, a 'privilege.' No one has a claim against A that he shall not smoke the cigar. What is the possible juristic significance of the act? Does the law in any way undertake for the advantage of others to say that A shall, or shall not, smoke the cigar? Not at all. Then where is the juristic significance? Clearly there is no positive juristic content in the exercise of a liberty, and it is equally apparent that if the law attempted to supervise every possible act of liberty, in criminal law or otherwise, it would break down with its own weight. It should be emphasized that nothing less than *every* act of liberty is in question, and that no acts are involved which are a breach either of public or private duty.

This category reduces to this: Where one has no right to, or claim upon, the act of another, the other may do as he pleases. *Ex nihilo, nihil fit*. The two categories last discussed are simply two kinds of negatives—the absence of power and the absence of right (claim), respectively. In neither case is there a correlative. Non-existence is the most absolute thing in the world, and incidentally it is perhaps one of the few logical absolutes.

But while 'no-right' and 'no-power' must be regarded as juristic negatives and as logical absolutes, yet in fairness to Professor Hohfeld's System it is necessary to consider these terms in the

with the term 'privilege' in the sense of 'liberty,' i. e., absence of jural relations.

(b) The term 'privilege' as used by Prof. Hohfeld is a blending and confusion of jural and non-jural concepts. In the variations above set out there are three separable ideas—liberty, privilege, and power. A term of such extension is unworkable and will result in confusion in cases where refinement of discrimination is called for in legal operations.

(c) As to Prof. Borchard's contention that a 'no-duty' situation has a jural character, we need only enter a simple denial. The thing itself speaks. We do not deny, of course, the procedural necessity of establishing negatives of *claimed* jural relations. The declaratory judgment where a plaintiff establishes that he owes no duty to the defendant is not different from the case where the defendant in an action succeeds in getting the judgment of the court that the plaintiff has no cause of action.

A similar confusion of jural and non-jural relations is found in a recent book ("Les transformations générales du droit privé") by Professor Duguit of the University of Bordeaux (translated in part as one of the chapters of "Progress of Continental Law in the Nineteenth Century" (Cont. L. Hist. Ser., XI, cap. iii). Professor Duguit, who may be said to be one of the most extreme representatives of the newer 'functional' jurisprudence, interprets the modern trend of law as being toward 'objectivism,' which according to him means a progressive cutting down of 'subjective' (legal) rights. We have attempted to show elsewhere that what has been reduced is not 'rights' but 'liberties': Jour. Cr. L. and Criminol., IX, 464 (469-470).

Failure of discrimination of these ideas is not always unimportant, as may be seen in *Kemp v. Division*, 255 Ill. 213, 99 N. E. 389; cf. ILL. L. Rev., VII, 320, 323; VIII, 126.

exact form in which they have been presented; since it may be possible, contrary to expectation, that an absolute term may be, if not relative (which involves a contradiction), at least correlative, in jurisprudence. The question, therefore, may be formulated as follows: Is 'no-right' the correlative of a liberty ('privilege'), and is a 'no-power' (disability) the correlative of 'immunity'? In other words, are liberty ('privilege') and 'immunity' relative terms or are they absolute terms?

The term liberty ('privilege') is clearly an absolute term, in any practical sense. The term 'no-right' has no greater connection with liberty by way of correlation than have 'no-power' (disability), or 'no-duty' or 'no-liability,' or 'power,' or 'duty,' or 'liability.' Professor Corbin's explanation of 'privilege' as another name for 'no-duty'²⁹ makes this still more evident. Here it is clear that 'no-duty' and 'no-right' are both mere negations and that as such they can not be in relation in any logical sense.

Likewise, the term 'immunity,' as used by Professor Hohfeld, is also absolute. It can not claim for its correlative 'no-power' (disability) to the exclusion of 'no-liability' or 'no right.' If A is the owner of land without outstanding rights or powers in others, he is not in his situation as owner, which gives him certain claims and powers against others, under any duty or liability to such others. There is no right against him (e. g., to make a conveyance as holder of the legal estate in trust); nor has any person the power to divest his title. Clearly A's situation is, as respects others, an absolute legal situation. As to his title, no act can be claimed from him nor any act projected against him. If B, a stranger to the title, should go through the form of making a conveyance of a fee simple right in A's land, the act would be a legal nullity. Moreover, B is under no legal duty not to make such a paper conveyance. Any act of B attempting to convey A's title would be wholly lacking in legal consequences. Accordingly, A's situation, as owner, as to such an act on the part of B, is absolute; it has no connections or correlatives, and is lacking in juristic importance.

29. "Legal Analysis," Yale L. Jour., XXIX, 167-8. It is interesting to note that when 'no-duty' is substituted for privilege, not only is there a change of position (see note 11 ante), but the logical symmetry of the Hohfeld tables is adversely affected in this that a negative term is ranged alongside other terms intended in the Hohfeld System to be positive terms. Thus, it is necessary to speak of 'rights,' 'no-duties,' 'powers,' and 'immunities.' All this, it seems to us, is further evidence of the fatal error of attempting to include 'liberty' in a table of jural concepts.

III

The subject matter of Professor Hohfeld's tables is full of intrinsic difficulties, and the present writer cannot safely assume with too much confidence, in pointing out what seem to him to be valid objections, that he has always succeeded in his understanding of the Hohfeld System, and that he has been able, on the other hand, to avoid falling into errors of his own. One of the most competent authorities in this field has already spoken of Professor Hohfeld's tables as showing ingenuity, to which sentiment we subscribe without reservation. The same authority has also advanced objections on other grounds to some of the terminology used by Professor Hohfeld as lacking juristic significance.³⁰

Professor Hohfeld's table arouses curiosity as to how he proceeded to work it out. No explanation is given. Can we be sure that there are only four fundamental juristic terms? Could there not be more than four? No answer is given by Professor Hohfeld or by his associates, or, so far as is within our knowledge, by anyone who has adopted Professor Hohfeld's System. Superficially, the tables seem to be an enumeration, but a closer inspection shows a regular alternation of the secondary terms when the two tables are compared; thus 'no-right' and 'duty' change places, as do also 'disability' and 'liability.' This may perhaps explain the rigid symmetry of the scheme, and this rigidity may account for some of the objections which have been offered. But why did Professor Hohfeld select, or how did he discover, four fundamental jural terms—the "lowest common denominators"? No satisfactory answer can be given, and surmise is all that is left.

Hohfeld was not *ex professo* a teacher of jurisprudence, but there can be no question that he was an assiduous student of it and that he had a natural bent for that kind of thinking. His literary apparatus shows an intimate acquaintance with everything on the subject printed in English, but it shows no acquaintance at any point with an important literature, especially in German, which has explored juristic ideas in various directions which have not yet been made familiar to us in our own language. This isolation must be regarded as a great hindrance to any investigator in jurisprudence, but in spite of it, or rather because of it, Hohfeld succeeded in building up a structure which has the unquestioned merit of originality and ingenuity. The terms themselves used by Professor

30. Prof. Roscoe Pound, "Legal Rights," *Int. Jour. Ethics*, XXVI, 92 (97).

Hohfeld are not new and two of the combinations 'right-duty' and 'power-liability' are not new, but the tables as a whole are original. It seems probable that the terms were derived from, or to some extent based upon, the notable manual of Salmond,³¹ but the exact method of construction must be at best conjectural unless among Professor Hohfeld's papers his work-sheets happen to be preserved. We shall not attempt to pursue the inquiry.

What we regard as the basic defect of his method is his failure to search for and to proceed from the fundamental concept of jural relation. Without a clear understanding of this primary juristic idea, it was nearly inevitable that no table of jural relations could be constructed which would not disclose objections, however symmetrical it might turn out. Professor Hohfeld's use of terms shows an entire lack of recognition of the important distinction between jural relations and juristic facts, and this confusion of ideas may account for the circumstance that half of his table deals with situations which do not involve any jural relation whatsoever.

Our conclusion, not arrived at without much reflection, is that the System, in so far as it shows originality, is without juristic value; that at one point where the term 'privilege' is used to mean 'liberty,' the table is objectionable on the double ground that 'liberty' is a non-jural concept and that its double usage, which includes 'power,' is a misapplication likely to lead to much confusion in the solution of delicate legal problems; and that at another point the term 'immunity' is unduly narrowed to exclude the important function of jural relation.

A reconstruction of the Hohfeld tables in the light of the objections advanced is as follows:

TABLE OF CONTRADICTORIES

<i>Jural Concepts</i>		<i>Non-Jural Concepts</i>	
Right	Power	Liberty	Immunity
No-right	Disability	No liberty	No-Immunity

TABLE OF CORRELATIVES

<i>Jural Concepts</i>		<i>Non-Jural Concepts</i>	
Right	Power	Liberty	Immunity
Duty	Liability	None	None

31. "Jurisprudence,"³ cap. x.

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NOTICE

BAR EXAMINATION POSTPONEMENT

Notice is hereby given that the regular July examination of applicants for admission to the Bar pursuant to Rule 39 of the Supreme Court of Illinois, has been postponed for one week and will be held at Chicago, Illinois, on July 13 and 14, 1920.

Applicants are required to have their applications and proofs in the hands of the Secretary of the Board of Examiners on or before June 15, 1920.

CHARLES L. BARTLETT,

Secretary, Illinois Board of Law Examiners.

COMMENT ON RECENT CASES

NEW TRIAL FOR INADEQUATE MEANS OF DEFENSE—UNEQUALLY MATCHED COUNSEL—PEOPLE V. BLEVINS ONCE MORE.—Eight years ago these pages contained a comment on *People v.*

Blevins, 251 Ill. 381, 96 N. E. 214, followed by a letter replying to the comment (ILLINOIS LAW REVIEW, Vol. VI, pp. 408, 536). The Supreme Court now, in *People v. Laures*, 289 Ill. 490, 124 N. E. 585, returns to the subject, once more raised on appeal, and furnishes an authoritative interpretation of the present effect of *People v. Blevins*.

In that case a trial for a homicide of special brutality and treachery, the main ground of reversal stated in the opinion was that the counsel for the defense were "overmatched" and not well equipped by experience and practice for the burden placed upon them." The accused was represented by two lawyers, one of them a young man of two years at the bar, the other having "a limited experience in the practice of criminal law." The prosecution was represented by two state's attorneys and by two other lawyers privately retained. The defendant's counsel moved that the three counsel other than the Johnson County state's attorney be debarred from acting with the prosecution, and the denial of this motion was made the main ground of reversal.

Now the burden of the comment in these pages was that this amounted to recognizing in principle that the accused is entitled to the assistance of lawyers as many and as highly skilled in criminal practice as those who happen to be engaged in the prosecution, and that therefore it is a legitimate subject for appellate scrutiny in each instance whether the defense is "overmatched" (that was the Supreme Court's word) in this respect by the prosecution. Such a principle would obviously have dangerous consequences, and it was our object to protest against its recognition as a principle.

But looking back now over the comment, we do not hesitate to express the opinion that our apprehensions were not well founded, and that our remarks overemphasized the supposed danger of the ruling. The Supreme Court believed that the accused had not been given, under all the circumstances, a fair opportunity to defend himself, and the stress laid by the opinion on the "overmatching" of the accused's counsel was not to be interpreted as the recognition of any general principle.

In *People v. Laures*, just decided, counsel on appeal contended that the two trial counsel "were so inexperienced in the trial of criminal cases that the accused on that account did not receive a fair trial," and that "a new trial, under the reasoning in *People v. Blevins*, should be granted for that cause alone." But this contention is now repudiated by the Supreme Court. It is pointed out that the most important feature of unfairness in the *Blevins* trial was that the counsel for defense had been assigned (the accused being without means to pay) only two days before trial, and that their motion for a continuance, to obtain time to prepare, had been denied by the trial court. On this ground alone, the inadequacy of the trial might have been presumed. As to the "overmatching" of the lawyers, the recent opinion says: "No two cases are exactly alike on the question of the employment of private counsel to

prosecute, or the competency or incompetency of the lawyers for the accused. Each case must in a large measure be decided on its own special facts. In the Blevins case this court did not reverse solely because of the incompetency of the counsel for the accused. While the court did say that, under the circumstances there shown, the trial court had not properly protected the interests of the defendant, we think it is clear that that was only one of the causes, and not the principal one, that moved this court to reverse the case."

This interpretation of the opinion in *People v. Blevins* leaves the Supreme Court with rational freedom to give suitable weight, under all the circumstances, to inadequacy of professional advice and management, as depriving of a fair trial.

How important a feature this may become is shown by the charges recently made in the agitation against our military trial system. But we are convinced that in the ordinary criminal trials of the civil courts, there is ample room for improvement in the assistance furnished to accused who lack money for retaining counsel. Not until the public defender or his equivalent has become an established institution can we dare to claim that we have yet realized the ideal of Magna Carta, viz., that justice shall be denied to no man.

Those whose professional conscience moves them to be anxious about this phase of our justice will do well to procure and study Mr. Reginald H. Smith's elaborate and epoch-making report entitled "Justice and the Poor," recently published for the Carnegie Foundation (576 Fifth avenue, New York City).

J. H. W.

REVENUE—ASSESSMENT—WHAT CONSTITUTES ARBITRARY OR FRAUDULENT OVERVALUATION.—By a long line of decisions, the Supreme Court of this state has very consistently held that mere excessive valuation is no defense to the exaction of a tax. The taxpayer has his recourse to the proper body (Board of Review), and if he fails to convince that body of the excessiveness of the assessment, the assessment will stand in the absence of fraud or arbitrary act (*Spring Valley Coal Co. v. People*, 157 Ill. 543; *Keokuk Bridge Co. v. People*, 196 Ill. 268; *People v. Bourne*, 242 Ill. 61; *McChesney v. People*, 178 Ill. 548; *Sanitary District v. Young*, 285 Ill. 361; *People v. White & Co.*, 286 Ill. 263). And proof of fraud must be clear and convincing (*Sanitary District v. Young*, 285 Ill. 364). In that condition of the law, speculation has at times been rife as to whether such a thing as proving fraud in an assessment is not, indeed, a myth and the language of the cases mere form, so far as the inclusion of any such exception to the rule of unassailability of an assessment is concerned. The recent cases of *People v. St. Louis Elec. Bridge Co.*, 290 Ill. 307, 125 N. E. 280, and of *People v. St. Louis Merchants' Bridge Co.*, 291 Ill. 95, 125 N. E. 752, are, therefore, most opportune.

At first blush it might seem that the two cases are anomalous in their joint effect upon the law of the state, for the one case

(*People v. St. Louis Elec. Bridge Co.* 290 Ill. 307) holds that the assessment there involved was arbitrarily and grossly excessive, unfounded upon, and bearing no relation to, any possible standard of valuation of the bridge there sought to be assessed; whereas the other case (*People v. St. Louis Merchants' Bridge Co.*, 291 Ill. 95) holds with equal finality that the assessment of the bridge involved in that case, though far in excess of the values of the earthwork, masonry, iron, timber, lumber, and labor required in its construction, would not be disturbed, as that alone would not justify a conclusion of fraud or arbitrariness in the assessment. Upon that statement of the two cases, it would follow that the cases are in irreconcilable conflict. Yet a closer scrutiny of the facts establishes that that is not true, and that they are, in fact, in harmony with each other and with the rule above observed.

In the former of the two cases (*People v. St. Louis Elec. Bridge Co.*, 290 Ill. 307), the evidence showed as the only facts at all, upon which the assessor might proceed in making his valuation, the existence of the structure, its original cost, the depreciation, the proportion of the bridge in the jurisdiction of the state, the use of it and the revenue derived from such use. The structure had no market value, and, from all that appeared, the location of this bridge did not enhance its value an iota above that of the worth of the elements entering into its construction. In the other case, however, the assessor had additional facts to go upon: The bridge was owned by an association and used as part of a system of fourteen railroads in connection with another bridge (the Eads bridge), also owned by that association. It was an integral part of this system. Two railroads (one at either end of the bridge) had been incorporated for the express purpose of connecting with the bridge. The Eads bridge had been valued at much more than the assessment complained of against this bridge, though the amount of business it accommodated was hardly as much. In that situation the court might well consider, as it did, that the assessor might in good faith and in the exercise of sound discretion determine that the bridge had a value by reason of its being a part of this system, greatly in excess of the value of the parts and materials of which it was composed.

That element of peculiar situation and connection, of being a part of a going system for the handling of traffic, was not present in the *St. Louis Electric Company's* bridge, which, under the evidence, was an isolated concern with no value from any particular relation as part of a system, as was the bridge of the other company. The cases indicate that it is sufficient to support the bonafideness of the assessor's act if he has anything that he may reasonably go upon in making his assessment, and he need not justify his assessment by itemizing and pricing each particular element. That would seem to be the proper ground of distinction between the principal cases under discussion.

E. M. L.

PRACTICE ACT—WHEN IS A FREEHOLD INVOLVED?—The Supreme Court, it would seem, has committed itself to the doctrine that a forcible entry and detainer proceeding can never involve a freehold within the meaning of the Practice Act, so as to justify an appeal direct from the nisi prius court to the Supreme Court (ILLINOIS LAW REVIEW, VIII, 183; XIV, 223-225), because that proceeding involves only possession, and whoever has possession or right of possession will prevail. Thus in the case of *Corwine v. Wigginton*, 290 Ill. 321, 125 N. E. 305, the defendant was in possession of premises of which it was sought to evict her by a forcible detainer proceeding. Her possession was under an arrangement whereby she had a life estate after the life estate of her grantor, with a remainder in fee after her death to her lineal descendants, but she was to occupy the premises during the grantor's life as his tenant, rendering him a yearly rent. Under those circumstances the plaintiff in the forcible detainer proceedings had bought the interest of defendant's grantor at a sheriff's sale, and got a deed therefor. Thus the proceeding clearly did not involve a freehold.

But suppose, in the principal case, the conveyance had been in fee to the defendant, with no reservation of any right in the grantor, and the plaintiff nevertheless had assumed to ignore this claim of title by defendant and had assumed to purchase the premises at a sheriff's sale, as the property of the grantor, had got a sheriff's deed therefor and in forcible detainer proceedings, upon production of the sheriff's deed, had obtained a judgment of eviction against the defendant. Would a freehold be involved? That, of course, involves purely a question of intention of the legislature as to what cases may be appealed to the Supreme Court direct. An early appellate court case suggests (*Kipley v. Luke*, 10 Ill. App. 403) that in such a case a freehold is involved, because the controversy could not be determined without deciding which of the litigants is the owner of the fee. That appellate court case cites an early Supreme Court case (*R. Co. v. Dunbar*, 95 Ill. 579) which is not in point but which uses language from which the appellate court arrives at the above conclusion by analogy.

It would seem that if the Supreme Court means what it says in its recent expressions, then, even in the suppositional case, a freehold is not involved because all that the action gives is possession, and the remedy of the defendant would be ejectment. In other words, to get to the Supreme Court, the defendant might have to start another suit of her own. Whether that is the result the Supreme Court intended by its language or not, it is to be hoped that opportunity for positively settling this point will soon arise.

E. M. L.

PUBLIC UTILITIES—VALUATION OF PROPERTY FOR RATE-MAKING PURPOSES.—The Supreme Court has at last expressed itself on the much-debated question of public utility valuations for rate-making purposes. The Public Utilities Law became effective January 1, 1914. It was almost exactly six years later before the court

rendered a decision in a valuation case: *Utilities Commission v. Springfield Gas Co.*, 291 Ill. 209, 125 N. E. 891. The decision is important as an interpretation of the Public Utilities Law, and a construction of the powers and duties of the commission thereunder. It is also important as an indication of the probable trend of utility valuations in Illinois.

The court decided for Illinois three points that have commanded widespread interest in the domain of economics and of politics. It held:

1. The contention that the only equitable basis for determining value for rate-making purposes is the cost of reproduction new, less depreciation, cannot be sustained.
2. Going value is always present in every assembled and established plant doing business and earning money. It is a property right and must be considered by the commission in determining the value of the property upon which the utility has a right to make a fair return. Going value must be separately ascertained by the commission.
3. The original cost of construction, less depreciation, is not the measure of value to be employed in rate-making cases.

The opinion of the court was written by Mr. Justice Thompson. It is dignified, scholarly, and shows a marked appreciation of the problems involved. It expressly disclaims an intention on the part of the court, and denies the authority of the court, to interfere with the sound discretion vested in the commission by law. It attributes to the commission in the exercise of its functions a high dignity and great responsibility, and asserts that there should be ascribed to the commissioners the strength due to the judgment of a tribunal appointed by law and informed by experience. The court reaffirmed the doctrine now well established under our statute and generally received with approval throughout the country, that the right of the court to review the conclusion of the commission is limited to determining whether or not the commission acted within the scope of its authority, or the order is without substantial foundation in the evidence, or a constitutional right of the utility has been infringed upon by fixing rates which are confiscatory or insufficient to yield a reasonable return on the present value of its property.

The early part of the opinion is devoted to a discussion of principles in which the court refers literally to leading authorities in other jurisdictions. In applying the principles so developed to the facts in the case at bar, the court laid down certain rules for the guidance of the commission, among which may be enumerated the following:

1. The statement of the commission that it has "considered" going value in appraising a utility property for rate-making purposes will not prevail to sustain a valuation when it is manifest from all of the evidence that the finding of the commission does not include this element of value.
2. The discretion of the commission cannot override the discretion of the officers of the corporation in the management of its affairs.

3. Where it appears from the finding of the commission that only a certain proportion of the actual value of the whole or part of the property of the utility is to be taken into consideration, then such value must be stated by the commission or the proportion considered must be stated.

4. It is not arbitrary or unreasonable for the commission to fix 7 per cent per annum as a fair rate of return upon the fair value of the gas property at Springfield.

5. The commission cannot ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.

6. The finding of the commission need not be supported by a clear preponderance of the evidence; it is enough if the finding is not against the manifest weight of the evidence.

7. To enable the courts intelligently to review its decision the commission should make its findings specific enough to enable the court to determine upon what basis it made its valuation, and what elements of value entered into it, with a specific and separate valuation of each element.

8. It is not necessary for the commission in its findings to value separately the articles of property considered by it, but it should state its ultimate conclusions as to each of the elements necessary to be considered.

9. In order to readily see and understand the elements of value considered by the commission, and the consideration given these elements in reaching its final decision, it is necessary that the findings of the commission disclose the specific valuations of the elements considered.

10. The court will not review the findings of the commission on the separate elements of value considered by it, but will limit its review to the final result.

The case started before the commission with a complaint filed by the City of Springfield, alleging that the gas rates charged by the Springfield Gas Company were unreasonable. The rate schedule in effect at the time ranged from a dollar per thousand cubic feet to sixty cents per thousand cubic feet. After an extended investigation the commission filed an opinion under which it established a schedule ranging from eighty cents to sixty cents per thousand cubic feet. On an appeal to the Circuit Court of Sangamon County, the order of the commission was set aside, but the cause was not remanded to the commission. The Supreme Court sustained the judgment of the circuit court in setting aside the order of the commission, but held that the circuit court erred in not remanding the cause for further proceedings. The judgment of the circuit court was modified by remanding the cause to the commission for further proceedings in accordance with the views expressed by the Supreme Court.

The court declared emphatically that there is no hard and fast rule for determining reasonable rates for public utilities. The questions presented in the case were largely questions of business judgment, and no rule could be laid down which could be applied mathematically to every situation. Every case must rest largely

upon its own facts. The court is aware of the grave character of the questions with which it has to deal, and of the great injury, not only to private interests, but to the public at large, that may result from error. The rate established must be just and reasonable both to the public and to the utility. There is difference between a rate which is merely non-confiscatory and one which is just and reasonable, and it is the just and reasonable rate which the commission is called upon to fix. A just and reasonable rate is necessarily a question of sound business judgment rather than one of legal formula, and must often be tentative since exact results cannot be foretold. The real test of the justice and reasonableness of any rate seems to be that it should be as low as possible and yet sufficient to induce the investment of capital in the business and its continuance therein.

Advocates of fixed theories of valuation will be prone to criticise the opinion of the court on the subjects of cost of reproduction, new, going value, and original cost of construction, for the reason that the opinion is based almost in entirety on precedent. The court has elaborated no independent theory for discarding reproduction cost, new or original construction cost, as conclusive evidence of present value. Nor does the court present an independent course of reasoning in support of its conclusion that the going value element must be considered by the commission and be separately appraised. Whatever merit may be found in such criticism is largely removed by the final conclusion of the court that the ultimate determination of value is a business question. After all is said and done, the process of valuing the property of public utilities for rate-making purposes is but a means to an end, and in many instances a relatively unimportant means.

The specific grounds on which the order of the commission was set aside were that the commission failed to take into consideration the going value element, although the commission stated in its opinion that it had considered such element, and that it failed to find what part of the value of the gas holder should be included in the company's property. The court sustained the finding of the commission as to the reasonable amount to be allowed for operating expenses, holding that such finding was not contrary to the manifest weight of the evidence.

This decision should have an important effect on the future growth and development of public utility enterprises in Illinois. It is confidently to be expected that it will encourage rather than discourage the investment of new capital in public utility enterprises. On the other hand, it affords reasonable assurance that so far as the machinery of the law is concerned, the consumers of utility services may impose confidence in public service corporations with reasonable assurance that they will not be exploited.

W. D. K.

WILLS—REVOCATION.—In April, 1919, the appellate court decided in *Limbach v. Limbach* (not yet published), that a nuncupative will could not revoke a prior written will, and that as the writ-

ten will in the case before the court disposed of the entire estate, the nuncupative will could have no effect and was not entitled to probate. A certificate of importance was granted. The Supreme Court in *Limbach v. Limbach*, 290 Ill. 94, instead of passing upon the revocation of a written will by a nuncupative will (which was doubtless the point the appellate court considered important), rests its decision upon an entirely new ground. It says there was no revocation, because none was *expressly declared*. This reasoning would apply to the case of a subsequent written will. For example, it is said on page 96:

"In some states a will may be revoked wholly or in part by implication by the execution of a later will containing inconsistent or repugnant provisions, but that rule does not prevail in this state, because the statute on the subject of revocation is specific."

It is believed that this language, if it is intended to apply to written wills—and there is nothing in the opinion limiting its application to nuncupative wills—is a departure from the previously declared law of this state.

The case of *Stetson v. Stetson*, 200 Ill. 601, which is the only case cited by the court in support of this rule, held that where a subsequent will, which contained a clause revoking all former wills, was destroyed, the former will was entitled to probate. Whether it is said that the former will is revived, or that it was never in fact revoked, because the revocation provision in the second will could not become operative until the death of the testator, makes little difference. The result is the same. But the latter position is, perhaps, the more logical, and was adopted by the court in *Stetson v. Stetson*. To show that the second will could not have operated as a revocation prior to the testator's death, the court points out that under the Illinois statute revocation can only be accomplished by a later will, and not by *any instrument in writing*. The second will might have been regarded as an instrument in writing prior to the testator's death, but not as his will; and being destroyed before his death it never became his will, and there was no revocation. It will be seen that this case has nothing to do with the question of implied revocation by a subsequent inconsistent will and the language in *Stetson v. Stetson* (page 609), that—

"by the terms of this statute, the subsequent will, which shall have the effect of revoking a former will, must be a will 'declaring the same'; that is to say, must be a will which, upon its face and by its terms, declares a revocation,"

must be regarded as dicta. But even taking these words as they stand, it might well be held that a subsequent inconsistent will did "upon its face and by its terms" declare a revocation. There can be no doubt that as between two wills it is the later that the testator intended to be effective. Otherwise, why make the second will? Giving effect to the later will is following both the dictates of common sense and the unanimous authority of decisions in England and in other states. To be sure, our statute is peculiar. But

the California court, in *Clarke v. Ransom*, 50 Cal. 595, 601, had no difficulty with a similar situation. The statute provided that a written will could not be revoked or altered in whole or in part—

“except by a written will or other writing of the testator declaring such revocation or alteration and executed with the same formalities with which a will should be executed by such testator.”

The paper presented to the court as a later will contained no express words of revocation, but was in part inconsistent with the prior will. The court held:

“The words, ‘declaring such revocation or alteration,’ as employed in the statute, mean nothing more than that it shall appear from the provisions of the last will, that it was intended to alter or revoke the former, in whole or in part.”

The former will was therefore revoked *pro tanto*.

It is to be noted that in the instant case the question of a total revocation by the nuncupative will was not presented. The prior written will gave all the estate to the testator's wife; the nuncupative will gave certain shares of stock in the Chicago Mill and Lumber Company to specified legatees. Both could have been admitted to probate, the second revoking the first merely as to the disposition of the shares of stock in question. To hold that only the acts expressly mentioned in Section 17 of the Wills Act can operate as a revocation of a former will is clearly contrary to the law of Illinois, as announced prior to the decision in this case.

In *Phillippe v. Clevenger*, 239 Ill. 117, it was held that a conveyance of land devised by will operates as a revocation of the devise in question, so that although the testator subsequently reacquired the land, and died seized of it, the devise was inoperative. It was argued that the devise could not be revoked except as provided in Section 17 of the Wills Act. To this the court replied (pp. 119, 120):

“The section of the statute referred to has been in force in this state since the enactment of the Revised Statutes of 1845, and in a number of cases decided by this court since that time wills have been held to have been revoked, in whole or in part, by the acts of the maker of the will which do not fall within the provisions of said section 17—that is, they have been held to have been revoked by implication. . . . We think it is clear, therefore, that section 17 of the Wills Act only applies to the revocation of a will where there is an express intention on the part of the testator to revoke a will, and that said section does not apply to the revocation of a will or a part thereof arising by implication of law from the acts of the testator which show such a *change in the condition of his estate* as to raise a presumption that he intended to *revoke a part or the whole of his will*. Section 6 of the English Statute of Frauds (8 Pickering's Stat. at Large, p. 406), which is, in substance, the same as section 17 of the Wills Act, in force in this state, was in force in England at the time the rule was established in that country that a will, or a part thereof, could be revoked by implication. *We are therefore forced to the conclusion that the doc-*

trine of the revocation of a will, or a part thereof, by implication, is not abrogated by statute in this state."

The language "change in the condition of his estate" furnishes a possible ground of distinction from the instant case. But *Philippe v. Clevenger* does squarely hold that the doctrine of implied revocation is in force in this state. That doctrine clearly covers revocation by subsequent inconsistent will (Schouler on "Wills," 5th ed., §§ 406, 407), and should be applied in such a case. If the issue is ever presented between two written wills, it is to be hoped our court will take the opportunity to distinguish or overrule the case of *Limbach v. Limbach*.
C. B.

COMMON LAW MARRIAGE.—The case of *Illinois Steel Company v. Industrial Commission*, 290 Ill. 594-598, 125 N. E. 252, just decided, recalls the suggestion in the comment in ILL. LAW REV., IX, 214, that cases of common law marriage will continue to arise in this state despite the law of 1905 invalidating them. In the case under consideration, the question arose upon the contention that a common law marriage had ripened in another state, Georgia. The facts, however, disclosed that the relationship was meretricious in its inception and there was no evidence that that relationship, which the law presumed continued as of that character, had changed. The foundation of a common law marriage, therefore, was lacking.

E. M. L.

DIVERSITIES DE LA LEY

A new department, "Diversities de la Ley," commences with this issue. A word of explanation may be desirable. In a general way, it is intended for contributions not already otherwise classified—in other words, for miscellany within the scope of this REVIEW. Specifically, the function of this new column may embrace the following kinds of materials (among others): (1) extended articles with little or no formal documentation; (2) relatively short studies, discussions, and comments in any field of legal science—even grotesqueries and curiosities.

*Qualitatively, the materials intended for this department bear the same relation to other departments of the REVIEW as is disclosed by the familiar contrast between principle and authority. A freer method of exposition is here suggested—a kind of *Mos Gallicus* in the face of the prevailing formality and reserve of law writing. It is thought that many profitable ideas remain voiceless, even in this prolific age of printing, because of the rigors of the taboo of form which deny them expression.*

An idea is not ordinarily considered fit for intellectual reception unless it is buttressed by the calendar of saints of the whole of the arts and sciences throughout the ages. Does it not also frequently occur in such cases that the idea itself is lost to sight, for reader and often for author, in the mechanical effort of verification?

This column is not a rebellion against the hegemony of the kingdom of the ancients in favor of a republic of free legal expression; nor is it intended to establish an empire of intuition, at war with the domain of intellectualism. A more conservative middle course is in prospect, which allows unlimited possibility to each point of view in its proper place. The Manes worship is not abolished from this REVIEW by the institution of this department. What is Cæsar's may still be rendered to Cæsar; but, it is proposed in this column that even an unverified theory may live the short life of one issue of this REVIEW, then to be buried and forgotten if such is its fate; that a thought may be brought to printed expression even though it had already been foreshadowed by Mencius or Zarathustra without the book and page being noted; and that an idea may be sketched even though it be but a part of a larger truth. It is believed that a column of this kind will not fail to be of interest and of scientific value.

Lastly, it may be emphasized that there is nothing in the title or character of this column intended to suggest any diminution of dignity or seriousness of purpose, or any invidious distinction. It is hoped that the busy writer or teacher may find here an outlet for his thoughts which he may employ as a convenience, and which he may in many cases prefer to use over the narrower and more formal avenue of the so-called 'leading article.' In the words of the Ec-

clesiastical Polity, "then is there in this diversity no contrariety."—ED.

SYNOPTIC AND HYPERETHNIC NOMOLOGY.—1. Old Dr. Whewell had a fascinating chapter on scientific terminology in his "Philosophy of the Inductive Sciences,"¹ and I think that I have seen similar chapters in Jevons and elsewhere. At any rate, it is time that we gave more thought to this subject in legal science. It is only scaffolding—or architect's blue-prints, if you like; but for every systematic construction those aids are indispensable.

2. Since the common English terms of our law are so variant or so loose in their present associations, we should frankly give up hope of using them for the scientific abstractions. We should rather do what medical science has done, viz., resort to the Greek for the elemental roots out of which to construct new words having the desired and fixed meanings. Latin has already furnished too many of the ambiguous terms, e. g., "jurisprudence," "conveyance," "voluntary." We cannot hope to be consistent in all details, nor to use Greek etymologies for all terms; but we can do almost as well as the doctors have done.

3. Today particularly we need to agree upon terms that will assist discussion of *world-law* in its several aspects. With that topic the present proposals are concerned.

4. Some years ago² I put forward a scheme of terminology based on Greek elements, viz., *Nomology*, for the science of law in general; and *Nomoscopy*, *Nomocritics*, *Nomothetics*, etc., for its several branches. But the *Nomology* there signified was the law of a single system, i. e., law as thought of by a person situated within its sphere and dealing with it as all the law that there was for him. Such is, of course, the situation for every person within a given independent state, or sovereign legal entity. And though there are many such independent sovereignties, each one remains, to those within it, the only law; *Nomology*, therefore, is the science of that law, and of that law only.

But now that the possibility of a world-law is on the horizon, it is desirable to find terms applicable to its several aspects. That is, over and above any particular *Nomology*, there are aspects of legal science due to the existence of several nomological systems, and to the possibility of a final, all-embracing, overplaced, or cosmic law, beyond which there is no other earthly law.

What would be the suitable terms, if we carry out the nomos-scheme of terms above referred to?

5. Before settling on the terms, we must settle how many new aspects of law thus arising require such terms.

I figure that there are three:

(a) First, there is the merely *comparative* aspect of plural

1. Ed. 1840, Introd. lxvii, "Aphorisms concerning the Language of Science."

2. Harvard Law Review, XXVIII and XXX, 821; Cases on Torts, vol. II, Appendix A.

systems assumed as not yet having any superior law in any form, e. g., if I desire to compare the principles of married women's property in several systems, what I find is certain unities and divergencies; but whatever I do find in unities of idea is *not law*, as such, in any one of the independent systems. It is merely an identical idea resulting from comparison. Nevertheless, it becomes the subject of science, therefore a form of nomology.

I propose to term this *Synoptic Nomology*.

(b) Next, we assume that a *genuine super-national law* of some sort has come into existence. By "genuine law" I mean something that is enforceable by united force as law, and is not merely the custom or usage or wished-for practice which we have hitherto called "(international) law."

(1) Now this genuine law in its initial form will probably be (at any rate may conceivably be) only a law for the national entities or persons which have combined to authorize it, i. e., a law only for relations between the individual states. Such a law would not deal with the relations between individual citizens as such, and would in general not recognize them as justiciable persons. In other words, the parties to a controversy under such a law would be states only. This is essentially the character of our present so-called international law.

(2) But, later, this super-law would reach the individual natural person. He would have rights and duties running direct to this super-law, and would not merely be an individual within some state entity having relations with his own state alone. Just as our nation in the original American Confederation recognized federal rights and duties between states only, but later established federal relations directly with the individual, so in world-law this second form would appear, and perhaps acquire as wide a scope as our own federal jurisdiction today.

(c) For both these forms of super-law, i. e., for the conception of a genuine world-law in any and all aspects, I propose the term *Hyperethnic Nomology*. This, of course, is merely the idea "supra-national" (a term already found in current discussion) turned into the Greek scheme.

(1) For the first variety above mentioned I propose the term *Meso-ethnic Nomology*, which is merely "international" turned into the Greek scheme.

(2) For the second variety above mentioned, I propose the term *Cosmo-politic Nomology*. The idea of "ethnic" must here be avoided, because the intervening state or nation drops out; the world-law deals directly with the world-citizen in such cases. It is a genuine instance of world-government reaching down to the individual natural person, and world-government is "cosmo-politic" in Greek elements.

(3) In contrast with these three forms of extra-national law, the Nomology of a single state (when the contrast needed expression) would naturally be termed *Monadic Nomology*.

6. What we now term "conflict of laws" or "private international law" presents no new conception, i. e., it is a part already of every individual state law, or Nomology; it is not a conception due to the existence of plural nomologies. It is simply a variation within the particular state law in certain conditions, i. e., a form of abnormal law. It needs a scientific term, of course, just as the so-called law of Persons does; but it is not a conception here involved.

7. Given a Hyperethnic Nomology, or a Synoptic Nomology, this larger Nomology will of course carry with it, for its own field, all the branches already recognized for Monadic Nomology, i. e., if the science of ascertaining the tenor of existing law be termed *Nomoscopy* (as in the scheme already proposed by me elsewhere), there will of course also be a Hyperethnic Nomoscopy. If the science of the history and development of law be termed *Nomogenetics*, there will also be a Hyperethnic Nomogenetics. And so on.

8. While admirals who were in England in 1917-18 are telling Congress how much more quickly they would have won the war had Washington headquarters taken orders from them, and while partisan politicians on Capitol Hill are searching the dictionary to find better words that will extinguish the embers of the world-conflagration, let us men of law turn to our task of promoting accuracy and system in the world-law that will govern the cosmos in the next generation.

J. H. W.

DIVES COSTS.—It would be interesting to know the precise origin of that old-fashioned term of chancery practice, "*dives costs*." Why should a suitor *in forma pauperis*, when given costs on the same basis as an ordinary litigant, be said to recover "rich man's costs"? No doubt riches must have been the portion of him who could successfully finance his own case in the High Court of Chancery, but one would hardly look for judicial recognition of that fact. Was the term, then, a bit of humor at the expense of the pauper, or was it merely due to the inability of the inventor's vocabulary to furnish a word better adapted to express the particular contrast? Beames, "*Costs in Equity*," 2 ed., p. 77, speaks of these costs as "quaintly termed," but offers nothing to satisfy our curiosity. In *Carson v. Pickersgill* (1885), 14 Q. B. D. 859, 866, Brett, M. R., says: "The term '*dives costs*' is a strange one. It is not easy to understand what it means. We have consulted our brethren in the Chancery Division, and the most experienced master in that division, and find that it is not clear what these costs are." In the view of Bowen, L. J., "they appear to be costs which the pauper, although not bound to pay, did in fact pay to his counsel or solicitor, and upon proof that he had paid such costs, he was allowed to tax them as against his opponent." Most of the early cases in which *dives costs* were awarded are cited in this decision, but all we can glean from them as to the term itself is that it was in current use in the 1700s. That it continued to be standard in the later chancery practice is apparent from *Church v. Marsh* (1843), 2 Hare 652 (cited 1 Daniel, "*Ch. Pract.*," 2 Am. ed., p. 50). It was there said by Wig-

ram, V. C.: "The rule of the court as settled by the case of *Rattray v. George*, 2 Beav. 376, and recognized, though not followed, in *Stafford v. Higginbotham*, 2 Keen 147, is that, where the pauper succeeds, it is in the discretion of the court whether he shall receive pauper or *dives* costs." *Williams v. Watkins* (1817), 3 Johns Ch. 65 (where Chancellor Kent stated the same rule), and *Bolton v. Gardner* (1832), 3 Paige Ch. 273, are instances of the expression in the New York Court of Chancery. R. W. M.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS'
ASSOCIATION

180. *Question*: 1. An attorney in the course of litigation is required to engage the services of an out-of-town attorney. This out-of-town attorney in due course renders his bill for the services rendered, upon the prior understanding that the forwarding attorney is to receive the customary one-third of the fee. The client could not have procured the services to be rendered by an out-of-town attorney for a less price than the amount charged. Is the forwarding attorney entitled to retain for his own use the share of the fee he receives from his out-of-town corresponding attorney?

2. Under a similar arrangement for the payment of a share of the fee to a forwarding attorney, the latter attorney arranges with his client to conduct the entire litigation, including disbursements, for a fixed amount. In the latter case, would he ethically be entitled to retain the share of the fee which he receives from his out-of-town corresponding attorney and not account for it to the client?

Answer: 1. The committee reaffirms its opinion that division of fees between attorneys "should be based upon a sharing of professional responsibility or of legal services, and that no such division should be made except with a member of the legal profession associated in the employment as a lawyer. Any other division would appear to be a mere payment for securing professional employment, which is to be condemned." (Question 42.)

All division of fees between attorneys is by agreement, expressed or implied, but as to whether a one-third-two-thirds division is customary outside of the collection business, the committee expresses no opinion. It is assumed that as the out-of-town attorney was retained in the "course of litigation," the forwarding attorney shared in the professional responsibility, if not in the actual legal services. Upon the above assumptions, in the opinion of the committee, the receipt of a share of the fee by the forwarding attorney is justifiable as a compensation for services, and it may properly be retained by the forwarding attorney for his own use. The client, however, should be advised of the fact that his attorney received part of the fee of the out-of-town attorney.

2. Assuming, as the committee does, that the client was not overreached or deceived in fixing the agreed amount, it is not of the opinion that the forwarding attorney owes an accounting to his client; but if the arrangement with the client is of a nature which,

for his proper enlightenment or to enable him to make a fair contract with his lawyer, requires a disclosure of the actual disbursements, of course, the client should not be deceived or misled by concealment of the division.

The committee does not understand the question to imply that the forwarding attorney agrees at all events himself to pay the disbursements.

181. *Question:* A lawyer has in behalf of a woman client, and with her consent, settled a suit instituted by him in good faith for breach of promise of marriage, by taking notes of the defendant, with a stipulation for entry of judgment in the action in case of default in payment. After paying some of the notes the defendant deliberately defaults, assigning as a reason that at the time of the alleged promise and the suit the plaintiff was a married woman. The lawyer investigates and learns that she was married about four years ago, and that her husband deserted her and disappeared a few months thereafter (all of which was known to the defendant at the time he made the settlement), and that his client is advised by relatives of her husband that he is dead; but the lawyer can give no confirmation of this information, nor any information of the husband's whereabouts.

In the opinion of the committee, is there any impropriety in the lawyer entering judgment pursuant to the stipulation for the unpaid balance of the amount of the settlement?

Answer: In the opinion of the committee, if the plaintiff's attorney believes that his client has acted in bad faith, he should withdraw from the cause, because he may otherwise be assisting in the perpetration of a fraud. If he does not so believe, there is still a possibility that the husband was alive at the time of the contract to marry, and that the stipulation was, therefore, the result of a mutual mistake as to a material fact. For this reason, it is the opinion of the committee that the attorney should not enter judgment on the stipulation without opportunity to the defendant to assert such ground as he may be advised why he should be relieved from the stipulation.

182. *Question:* Is there any impropriety on the part of a member of the New York bar allying or associating himself with a member of the New Jersey bar and employing the names of both attorneys as a firm name in New York, the object and terms of such association being that the New Jersey attorney shall attend to the New Jersey law business of the firm and that the New York attorney shall attend to the New York law business of the firm, and the said earnings are to be divided in accordance with the rules and regulations presently prevailing between forwarding attorneys, to-wit: One-third of said earnings to forwarding attorney?

Answer: The inquiry may involve questions of statutory construction, upon which the committee expresses no opinion. (See New York Penal Law, sections 270, 274.)

Without passing upon any question of law, the committee is of

the opinion that the use in New York of a firm name which includes the name of a lawyer not admitted to practice there is objectionable, because it may lead to the false inference that a lawyer of a foreign state is a member of the New York bar. But if there is no statutory prohibition, it is the opinion of a majority of the Committee that any association of the limited character indicated in the question in which it clearly appears that the New Jersey lawyer is not a member of the New York bar, or a partnership of the limited character indicated in the question not using such a firm name is not per se professionally improper. Provided, however, that such association or partnership is not used as a cloak to enable one not admitted to practice in the courts of one of the states to practice before the courts thereof.

183. *Question:* A defendant covered by insurance injures an infant plaintiff through the negligent operation of his automobile. The insurance company adjustors immediately make overtures to the infant's parents for settlement, and an amount is agreed upon satisfactory to the parents and the company. Thereupon the insurance company procures an attorney, not connected with its legal staff but on friendly terms with it, to prepare a petition and order appointing one of the infant's parents guardian ad litem for the proposed infant plaintiff. This, the outside attorney takes or sends to the parents of the injured infant for execution. The petition is presented and upon motion of the outside lawyer as attorney for the petitioner, an order appointing the parent guardian ad litem is entered. Next, by arrangement, the attorney for the guardian delivers a summons to the regular attorney for the insurance company, who defends the action on behalf of the assured. As soon as the summons and notice of appearance are filed in court and the action is at issue, the outside attorney for the guardian ad litem prepares a petition for leave to compromise the action for the amount of the agreed settlement. An order granting leave to the guardian ad litem is then entered authorizing the guardian ad litem to receive the amount of the settlement upon his executing a bond in the required sum. The fee for this bond is paid by the insurance company. After the money is paid over, and a general release taken from the guardian ad litem, the action is discontinued.

In the opinion of your committee, is such conduct on the part of the outside attorney, whose fee is paid by the insurance company, proper?

Answer: It does not affirmatively appear by the question that the "outside attorney" makes full disclosure to the court of his connection with the insurance company. Assuming that there is no such disclosure, the committee is of opinion that the conduct on the part of the "outside attorney" is highly improper and unprofessional, because in appearing as attorney of record for the plaintiff he represents to the court that he owes an undivided duty to the infant, whereas in fact he is employed, and is to be paid, by a company whose interest is adverse to that of the infant. (See *Matter of Reifschneider*, 60 App. Div. 478, Second Department.)

And even if the "outside attorney" does not make full disclosure to the court, still in the opinion of the committee the practice is not to be commended. The interests of the infant should be represented by independent counsel not biased by such method of employment, whose representation of the infant before the court should be based upon his independent and unbiased judgment. (See Questions and Answers Nos. 25 and 171.)

184. *Question:* A, an attorney in New York, forwards a commercial case to B, an attorney in Detroit. Nothing is said as to the method for fixing the charges of the respective attorneys, but at the close of the case B makes a charge of \$250.00, and, following the usual custom in commercial cases, remits one-third of the \$250.00 to A as the latter's share of the fee. A thereupon charges the client separately \$500.00 for his own services, without disclosing to B that he is making a separate charge and without disclosing to the client that he has received one-third of the \$250.00 from B. Is there any impropriety in A's conduct, either in the dealings with B or in the dealings with his client?

Answer: (1) In the opinion of the committee the confidential relation between attorney and client requires that every fact known to the attorney which might affect the judgment of the client as to the reasonableness of A's "separate charge" of \$500 should be disclosed by A to the client. It is, therefore, improper for A to conceal from the client that the former has received from B one-third of \$250.

(2) In the opinion of a majority of the committee the implication of the remittance by B is that he assumes that it is A's entire compensation. If A retains the remittance he should disclose to B the fact of his separate fee. But in so answering, the committee does not recede from its reiterated opinion that the sharing of fees is only justified by sharing either professional services or professional responsibility.

UNILATERAL TWINS AND OTHER PRODIGIES.—It is our fervent hope that nothing ever printed in this REVIEW, if not formally accurate to nine decimal places, will fall under the devastating eye of John S. Ewart, K. C., author of a book on Estoppel and another on Waiver, both of which were highly commended in these pages. In the last of these book reviews the wish was expressed that Mr. Ewart would turn his attention to other words in the law which carry meanings which sometimes impede clarity of thought when they do not produce wrong solutions of legal questions (ILL. L. REV., XII, 446 (447)).

Mr. Ewart has been silent, perhaps remorseful, for three whole years, but being called upon to review the third American edition of Anson on Contracts, he lapses into what is now for him a fixed intellectual habit of impeaching any legal terminology which is inapt or inaccurate.

The 'quasi contract,' the 'as-if-contract,' he argues (Can. L. Times, XL, 86) is a "stupid, or, at best, slipshod" usage. The

'quasi contract,' in Wellsian phrase, shows the "compact alertness of habitual travel," but that it is old does not alter the matter. For "are ancient crudities entitled to greater respect than modern? Is not the ashpit the proper place for old and young alike?"

We greatly fear Mr. Ewart has not suspected half the truth about the subject of contract. Nor can we agree with his irreverence concerning what is old, even though it has no virtues and many vices. The 'as-if-contract' is comparatively innocent alongside other forms of contract against which there has never blown any breath of suspicion or disparagement. If the 'as-if-contract' arouses Mr. Ewart's animosity, we hesitate to think what he will say of the agglutinative terminology employed in lieu of "a better contract nomenclature," by Professor Costigan in a recent instructive essay. Professor Costigan divides contracts 'implied-in-fact' into 'no-meeting-of-the-minds-implied-in-fact-contracts' and 'meeting-of-the-minds-implied-in-fact-contracts' (Harv. L. Rev., XXXIII, 376 (385)). Mr. Ewart is a destroyer of no mean caliber, but so far as any suggestion to him will influence his course, we must now appeal to him to come to the aid of all of us, not for the present as a wrecker of our own language, full of blemishes, but as a preserver, since the house is burning on all sides. The 'as-if-contract' was bad enough, but the 'not-as-if-contract' heretofore unsuspected, threatens to become a hyphenated calamity.

Mr. Ewart also lays a heavy hand on 'agency from necessity.' Why not, he asks the 'as-if-agent,' instead? But his chief quarrel is with the so-called 'unilateral contract.' The point made is hardly a new one, but his way of putting it is striking—

"A unilateral contract is as unthinkable as a unilateral elephant, or anything else which necessarily has two sides. Nobody would call a monologue a unilateral conversation, or a soprano solo a unilateral duet, or a lecture a unilateral debate . . . To call a promise a unilateral contract [is] as sensible as calling a lonely run a unilateral foot-race, or a single baby unilateral twins."

Words are wonderful things. They are the science of sciences and the art of arts. We have heard recently of a law student petitioning a certain faculty to be excused from the study of 'moral ethics' on the ground that this was wholly unnecessary for him, since he came from a 'legal family.' The thought here is not altogether clear, but perhaps the petitioner had in mind Aristotle's famous 'goat-stag,' or perhaps he meant to say that coming from an 'ethical family' he desired exemption from 'moral law.' Only the day before a former pupil, now a practicing lawyer, reminded us that he had once studied under the writer a course in 'legal jurisprudence.' Thus, we have not only unilateral bilateralia, as Mr. Ewart points out, but also what is richer, at least in poetic content, bilateral unilateralia.

A. K.

WANTED: THE ORIGIN OF THE INTERNATIONAL RULES FOR NAVIGATION AT SEA.—It so happens that there is just one subject, thus far in the history of the modern civilized world, on which uniformity of national law has virtually been attained. (I do not

speak of international law so-called, which is not yet law, and which concerns rules for behavior between States, not national laws for individuals.)

That subject is Navigation at Sea. For the governance of mariners in controlling the movements of their vessels in relation to other vessels, the several scores of rules about signals, courses, and other conduct on maritime highways, compose a code now acknowledged and uniformly adopted by thirty nations—virtually a world uniform law. This is the first great field in which the world of nations has demonstrated the practical possibilities of a universal law.¹ It is a harbinger of great progress.

And yet we have not on record a generally known account of the beginnings from which emerged this triumph of co-operative law. Known usually in this country as the Washington Rules (from the Conference of 1899; enacted in U. S. Rev. St., § 4233), and represented in Great Britain by the Merchant Shipping Act of 1894 (St. 57-58 Vict., c. 60), they date back at least as far as 1846 (St. 9-100 Vict., c. 100) in the shape of national law.

But were they anywhere law before then? And whence came their substance? And by what process of gradual accession did so many nations come to adapt and harmonize their national laws? Mr. Marsden in his "Collisions at Sea" (4th ed., 1897, p. 37) gives no more history than a reference to the Act of 1846. Mr. La Boyteaux ("Rules of the Road at Sea," Baker, Voorhis & Co., 1920, p. 1) at the rubric "Historical Development of the Rules," does not even cite the British Act of 1846, and contents himself with noting that "The Rules were first formally recognized by England and France in 1862, when those countries adopted uniform rules." M. Ripert, in his historical chapter in "Droit Maritime" (1913), makes no specific mention of their history. Mr. Reinsch, in his treatise on "Public International Unions" (1911), at § 7 of Chapter II (reprinted in Vol. XI of the Continental Legal History Series), gives substantially no further information. In editing that volume, I was much disappointed in being unable, upon casual search, to lay my hands on any historical account of these Rules.

However, it must somewhere be extant. And it ought to make interesting reading. Perhaps it now lies buried from lawyers' eyes in some journal of maritime affairs or some history of navigation methods. Can any reader furnish a clue? J. H. W.

THOMAS R. ROBINSON.—Thomas R. Robinson, D. C. L., whose article on "The Roman Law Element in the Swiss Civil Code of 1912" starts in this number, is a member of the bars of Connecticut and the District of Columbia, and is in practice at New Haven, Connecticut, is son of William C. Robinson, LL. D., whose famous treatise on "Elementary Law" is well known to lawyers everywhere. Mr. Robinson's article was awarded the Yale University Parker Prize in 1916 and it has not been hitherto published.—Ed.

1. Not counting the Telegraph and Postal Unions which deal with administrative methods.

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ARRANGEMENT OF THE LAW

BY HENRY T. TERRY

In substance our law is excellent, full of justice and good sense, but in form it is chaotic. It has no systematic arrangement which is generally recognized and used, a fact which greatly increases the labors of lawyers and causes unnecessary litigation. Probably the best way would be to put the law into the form of a code, whose arrangement would be authoritative and would quickly become known to the courts and the bar. Also there are a few old rules and distinctions that have remained sticking in the law, whose origin can be accounted for historically but for whose continued existence there is no rational reason. Those could be got rid of in a code; but in an arrangement which was not authoritative they would have to be retained, and would be anomalies. It may be, however, that the time is not yet ripe for codification, and that the best that is now practically obtainable is an arrangement put out and vouched for by some body or institution which might not have legislative authority but whose opinion would carry weight, such as the American Bar Association or one or more of the great law schools. Such an arrangement, if it met with wide approval, would serve as a basis for a code.

The arrangement of public law, including criminal law, presents little difficulty. In most places that part of the law has been already put into statutes which are practically codes, whose arrangement is usually good enough. The same is true of the adjective law, the law of evidence and procedure, as to which it is also the case that uniformity is not desirable, some states being able to get along with a much simpler procedure than others. What does need arrangement, and needs it very badly, is the private

substantive law, which forms the main body of the law. I shall confine what I have to say to that.

The object of an arrangement of the law is the practical one of making the law easier to find and understand. It would be barren pedantry to sacrifice that to any supposed theoretical perfection or 'elegantia.' Nevertheless no arrangement can serve that practical end unless it has in a high degree that character which we designate by the terms philosophical, scientific, or logical. It must be a logically developed arrangement, based on some comprehensive and methodical plan, which it must consistently adhere to.

Any good arrangement must be based on an exhaustive analysis of legal concepts, and the results of that analysis must be expressed in an accurate and logical terminology. The present terminology of our law is largely the result of accident and of conditions that have now passed away, and is confusing, unscientific, and unsatisfactory. There is an old saying that definitions are dangerous. That applies mostly to attempts to frame short and simple definitions of complex legal conceptions. But when we have analyzed a conception into its ultimate elements, those elements must be named and defined. Then from the materials thus obtained definitions of more and more complex conceptions can be built up 'per genus et differentiam.' For example, it would be very difficult to give a single concise definition of a contract. But a contract is one species of agreement; an agreement is one species of what may be called juristic acts, i. e., acts done to affect rights or duties; and a juristic act is one species of acts. By beginning with the definition of an act, and then adding successively the 'differentiæ' of juristic acts, agreements and contracts, we may at last arrive at a definition of a contract. By a definition I do not mean such a short statement as one might find in a dictionary. I mean that the legal concepts that we are to deal with must be described in words, so that their meaning and scope can be known and stated. Such a description, even of an ultimate and elementary legal conception, may require considerable space, and may include exceptions and qualifications. I suppose that the concept of an act is an ultimate and elementary one, but it cannot be fully given in a sentence. I shall attempt a little further on to explain the meaning of an act, not fully but sufficiently for the purpose of this article. But that description will perhaps take up a page. A definition of a juristic act would be much longer, while to define fully what is meant by negligence or fraud might take a long chapter.

Having by analysis and definition prepared our materials, a synthesis into a systematic arrangement becomes possible. So far as possible every legal principle should be stated once in its proper place in its most general form. Then should follow specifications, exceptions, and qualifications. But these latter cannot always be all given in the same place in connection with the general principle. The same general principle may apply to a considerable number of cases which would have to be treated in different parts of the law, and in such applications it may be subject to special modifications. It would generally be a question of reasonableness and practical convenience rather than of theory or logic, whether a particular special application or modification of the principle should be discussed in connection with the general statement of the principle or under some special topic. For example, the rule or principle that is expressed by the phrase '*res ipsa loquitur*' in its general form would fall under the general definition of negligence; there are some cases, which must be defined, where a presumption of negligence arises. In certain circumstances such a presumption arises against a bailee or carrier, depending upon conditions which are peculiar to bailees or carriers. Those special rules it would probably be more convenient and advisable to state in connection with the law of bailment or carriers than with the general subject of negligence. So legal principles in their general form may overlap in their application. Two perfectly well established principles may logically, as they are properly and correctly defined for the purpose of a general statement, apply to the same state of facts and give contradictory results. If so, the line between their fields of application has to be drawn and defined; and often this has to be done on grounds of pure justice or expediency, there being no reason of logic or scientific method for drawing it in one place rather than another. An instance of this is found in the case of infants. In general, an infant is not liable on his contracts, but is liable for torts. When, therefore, as sometimes happens, the same act is both a breach of contract and a tort, shall an infant be held liable or not liable for such an act? Courts have differed somewhat in their opinions on that question; but the decision has usually been put, and rightly put, on grounds of expediency rather than of theory or logic.

Legal principles and rules which are strictly legal must be distinguished from principles of justice and expediency which underlie the law and furnish the reasons for legal rules. Such extra-legal principles are proper for the consideration of the legislature in making laws, and are often of necessity resorted to by the courts as

guides in cases where the courts are really legislating, that is, in cases where there is in fact no rule of law applicable to the case in hand and the court really has to make a new rule; or where, as just above mentioned, the court has to decide between the applications of two conflicting legal rules, which in effect amounts to making a new rule. But such extra-legal principles are no part of the law, and should have no place in an arrangement, except so far as there is a rule of law that in certain cases the courts shall be guided by considerations of justice or expediency. Some of the legal maxims that are to be found in the books are really of this extra-legal character, such as the maxim "*salus populi suprema est lex.*" A good illustration of those extra-legal principles is found in the principle of the prevention of fraud, under cover of which the court of chancery succeeded in grasping much of its beneficent jurisdiction and building up a most useful and beneficial system of law to supplement the defective common law at a time when the legislature and the courts of common law were unwilling to do what needed to be done. It was not unlawful or in a legal sense fraudulent for a feoffee to uses to refuse to recognize the claim of the cestui que use and to keep the land for himself. But it was dishonest and morally fraudulent. The chancellor thought that it ought to be unlawful, and proceeded to make it so by making a new rule of law. The morally dishonest character of such conduct was the reason, or the ostensible reason for the chancellor's making such a law.

It is my own very strong belief that the arrangement of the greater part of the private substantive law must be based on an analysis of the conceptions of duty, right, and wrong. The remainder of this article therefore I propose to devote to an analysis, brief and incomplete, but I hope sufficient for my present purpose, of those concepts, and a brief outline of an arrangement based on them. But a preliminary definition of an act is necessary.

Austin's definition of an act, a volitional bodily movement, or a co-ordinated group of such movements, seems to me correct. The act itself, the mere bodily movement, must be carefully distinguished from its consequences, even from those consequences which directly and immediately follow it. Thus in the act of striking a person with the fist, the contact of the fist with the person struck, and a fortiori any further injury resulting to him, is not a part of the act. The same act could be done, the same bodily movement made, if there was no one within striking distance. So in the firing of a gun the act consists in the bodily movements by which

the gun is aimed and the trigger pulled. The motion of the trigger, the fall of the hammer, the explosion of the powder, the flight of the ball and its impact upon the object hit are but consequences. An act as above defined is an act *stricto sensu*, which seems to me the proper legal sense. But the word is often used *largiori sensu* to denote the bodily movement together with some of its more immediate consequences, as when we speak of the act of striking or shooting a person. In this sense the same act *stricto sensu* may be an element in several different acts. Thus, the act of firing a gun, the act of shooting a man and the act of killing him all involve the same bodily movements, but include more or fewer of their consequences.

Acts *stricto sensu*, as such, are never commanded or forbidden by the law. What the law seeks to bring about or prevent is always certain possible consequences of the act. The law says to a man: You must accomplish a certain result, e. g., the payment of a debt, and must do whatever acts are necessary or such acts as are sufficient for that purpose, leaving it to him to choose the acts. Or it says: You must not produce a certain result, e. g., causing another's death, and must abstain from all acts that will produce that result. The consequences by reference to which the law defines what acts must, or may, or must not be, done may conveniently be called the definitional consequences of the act. As will presently be explained, definitional consequences may be actual, probable, or intended consequences.

A duty is the legal condition of a person whom the law commands or forbids to do an act. The act may be called the content of the duty. The duty is defined by reference to the consequences which are, or are not to be, produced, the definitional consequences of the act, which are thus also the definitional consequences of the duty. There may be successive sets of definitional consequences, those nearest to the act being themselves defined as such as will or may produce or not produce further consequences. Thus in the duty of a city to keep a highway in a safe condition, the immediate definitional consequence, the consequence which in the strict sense is definitional of the duty, is the condition of the highway itself; the duty is broken if the highway is not in a certain condition, whether or not any harm actually results from its condition. But that condition is defined as a safe condition, i. e., one that will not cause harm to persons using the highway, such harm, or its avoidance, being the ultimate definitional consequence of the acts commanded and of the duty.

Usually it makes no difference whether the existence of a certain consequence or its non-existence be taken as definitional of the duty. Thus, in the duty not to kill a person, his death or his life may be regarded as the definitional consequences of the duty; and in the above mentioned highway duty, injury to travelers in the highway or their safety may be so regarded. We may, if we choose, distinguish between positive and negative definitional consequences, each being the logical-contradictory of the other, and may call either the definitional consequence of the duty, as may be convenient.

Definitional consequences may be actual, probable, or intended consequences, which give rise to a threefold classification of duties which seems to me very important. Duties of actuality are where the person subject to the duty is bound actually to produce or not to produce a certain consequence. The duty is not broken unless the positive or negative definitional consequence actually happens. It is not enough that he uses due care or makes all possible efforts or intends in good faith to produce or prevent it; he must actually do so. The duty to pay a debt is of this kind; the debtor must peremptorily do such acts as will actually put the creditor into possession of the money. So is the duty of a person who knowingly keeps a dangerous animal. He absolutely must prevent it from doing harm. The statement sometimes found that the foundation of his liability for harm done by the animal is negligence but that negligence is conclusively presumed, is a useless and misleading fiction. There are perhaps a few duties of this class where it is necessary to their breach that the consequences shall not only actually be produced but shall also be produced intentionally or negligently. In a trespass the duty broken is a duty of actuality, the act must actually produce a physical contact. But the authorities differ as to whether the contact must also be caused intentionally or negligently. When, as is usually if not always the case, intention or negligence is not necessary to the breach of a duty of actuality, but it is enough if the definitional consequence is actually produced or not produced, the duty may be called a peremptory one. Many duties of actuality, but not all, are subject to exceptions on the ground of the act of God, vis major, or inevitable accident, as is the case with trespass duties; but that does not mean that negligence is necessary to their breach. The act of God is not the same as the mere absence of negligence.

In a duty of probability the person subject to the duty is bound to act so as probably to produce or not to produce a certain consequence. Since probability means a reasonable probability, duties of

this kind are really duties to act reasonably and may be called duties of reasonableness. The duty may be broken, though the consequence never in fact happens; though in that case the actor may not be guilty of a wrong, because, as will be hereafter explained, in many cases something more than a mere breach of duty is necessary for a complete wrong. Or the duty may not be broken although the undesired consequence actually happens. All duties to use due care are of this kind, negligence, which is involved in their breach, being conduct which is unreasonably likely to cause injury. Thus, if a man drives an automobile dangerously fast in a crowded street, he is guilty of a breach of duty, whether he actually runs over anyone or not, the probability of his running over someone being what makes his act wrongful. On the other hand, if a bailee uses due care to keep the chattel safe, that is, if he does what reasonableness requires to that end, if he takes precautions which will probably be sufficient, he is not guilty of any breach of duty though the chattel is in fact lost or harmed.

Duties of intention are duties not to do acts with the intention thereby to produce a certain consequence, e. g., not to make a false representation with an intent that the person to whom it is made shall believe it and act upon it in a certain way. The duty is broken by doing such an act, although the intended consequence is not in fact produced, though here, too, the mere breach of duty may not amount to a complete wrong. There are at least two different kinds of intention, so that a consequence may be intended in one sense and not in another, and sometimes some other bad state of mind is required for a breach of the duty, in addition to a mere intention to produce the definitional consequence. Therefore, duties of intention can be further divided into several sub-divisions according to the precise states of mind necessary for their breach, but those will not be discussed here.

The word right has four different meanings in law; that is, there are four kinds of legal rights. Because there are no generally accepted names for these, I shall call them correspondent, permissive, protected, and facultative rights.

Correspondent Rights. When one person owes a duty to another to do or not to do an act, the latter person has a right against the former to have the act done or not done. The same act that forms the content of the duty forms also the content of the right. In fact, the duty and the right are the same thing, the same legal relation between the parties looked at from different ends. This kind of a right can be violated by the act of the person subject

to the duty, but it cannot be exercised. To exercise a right means to do the act that forms its content; and here *ex definitione* the act is to be done by the other party. Correspondent rights are of little or no importance in relation to the arrangement of the law. They cannot be separated from the corresponding duties. When the duty is defined, the right is also defined, so that almost always it is enough to define the duty. It is not necessary to have any separate place in the arrangement for such rights. Some writers, however, have regarded this kind of rights as the only kind, have tried to bring all legal rights under the definition of correspondent rights. That cannot be done, and the attempt to do so only leads to confusion. Other meanings of the word 'right,' and more important meanings, must be recognized. It will be noticed that in this kind of a right the existence of the corresponding duty cannot be inferred from the existence of the right. Such an inference involves a '*petitio principii*.'

Permissive Rights. A permissive right is the condition of a person whom the law permits to do or to abstain from an act. We say that he has a right to do or not to do it. The act is the content of the right. This kind of a right can be exercised, and when we speak of the exercise of a right, we usually mean a permissive right. But it cannot be violated. The violation of a right must be by the act of some person other than the holder of the right, and there is no act to be done or abstained from by any other person. It is true that a person may be prevented by the acts of others from exercising his right; but such prevention is not the same thing as the violation of the right. The prevention may be by conduct which is quite lawful, or it may be by some unlawful interference with his person or belongings. In the latter case, it will usually be a violation of some protected right of his, as will be hereafter explained. But that is different from a violation of the permissive right itself. If I have a right to go to a public museum, and some one burns the museum, I am prevented from exercising my right, but no legal right of mine is violated. If I am imprisoned to prevent my exercise of my right of free speech, it is not my permissive right of free speech which is violated, but my right of liberty, which is a protected right.

The act which forms the content of a permissive right, like other acts, is defined by definitional consequences. The right is a right to act so as to produce or not to produce those consequences. But if the same act which produces definitional consequences, as to which it is an exercise of the right, also produces consequences

which are not definitional of the right, it is not as to those latter consequences an exercise of the right at all, and may even be a breach of duty, if those latter consequences are definitional of some duty. Therefore, it is possible to commit a wrong in the course of exercising a right, or at least by the same act which in another aspect and relation is the exercise of a right. The statement so often found that the exercise of a right can not be wrongful, is true as to the exercise of the right in the strict sense, the producing consequences which are definitional of the right. But it is not true, or rather it has no application as to producing other injurious consequences. Thus the owner of a thing has a permissive right to do whatever he pleases with it so far as the effect of his acts upon the thing itself goes. Any effect upon or change in the thing, whether beneficial or injurious, is a definitional consequence of his right. As to such consequences, his acts are acts of ownership. But those are the only definitional consequences of his right. Any consequence which his act may produce upon other things or upon persons are not definitional consequences of his right, and as to them his acts are not exercises of his right or acts of ownership. His right is strictly a right in that thing. If a house burns down, and a dangerous wall is left standing by the street, and the owner leaves it there, so far as he is thereby depriving himself of the use of his property or continuing to hold in his possession a useless thing, he is exercising his property right by leaving the wall there. But if it falls into the street and hurts some one, as to that his leaving it there was not an exercise of his property right. So if a person displays hideous advertisements on the front of his house, which annoy his neighbors, his act, so far as it produces such annoying consequences, is not an exercise of his right in the house. If A shoots B with a gun, his act so far as it results in the destruction of the powder, the loss of the bullet and a strain on the gun, is an exercise of his right in the gun, but not so far as it produces effects upon B.

A permissive right is merely the absence of a duty, and there are no duties corresponding to it. The conception is essentially negative. It may be thought, therefore, that what was said above as to the unimportance of correspondent rights would apply to permissive rights also, that there is no need to describe them separately from duties. Theoretically that is so. If all legal duties were fully defined, there would be no need for separate definitions of permissive rights, because a man may do anything that the law does not forbid him to do and abstain from anything that the law does not

command him to do. But it is often practically more convenient to say directly what a person may do, especially in describing rights which are not common to all persons but are acquired by particular persons by special titles, as is the case with permissive rights of property. An easement, for instance, is easier described by describing what the holder of it may do, his permissive rights, than describing what he may not do, his duties.

Protected Rights. The two preceding kinds of rights relate to acts; they are rights to have acts done or to do acts. Protected rights are of a different nature; they are rights in states of fact, not in acts; rights to have certain states of fact exist. A protected right may be defined as the legal situation of a person for whom the law protects a certain state of fact. The state of fact, not any act, is the content of the right. To define any particular right, the state of fact which forms its content must be described. Thus in the rights of life, of liberty, or of a man in the consortium of his wife, the person's state of being alive, of being free from restraint, of actually having his wife's companionship, are states of fact which the law seeks to protect and in which the person has rights. The state of fact may be one that already exists, which the law seeks to conserve and continue in existence, as is the case with the right of life and usually with the rights of liberty, property, and marital rights; or it may be a state of facts presently non-existent which the law seeks to call into existence, as is the case of a creditor's right to the possession of the money which his debtor is to pay him or the right of a person unlawfully imprisoned to the state of liberty to be regained. The right itself must be distinguished from the state of fact that forms its content. The latter is a natural fact that might exist if there were no law; the right is a purely legal entity, a creature of the law, that could not exist without the law. To make more clear the nature of protected rights and their difference from permissive rights: the right of ownership is a complex group of rights partly permissive and partly protected. On its permissive side it includes the right to possess, *jus possidendi*, and the right to use. The owner is permitted to take and hold possession of the thing, which are acts, and to do acts of use. On its protected side it includes the right of possession, *jus possessionis*, and a right in the physical condition of the thing. The law protects for the owner his state of being in possession, that state being distinguishable from the acts of possession by which it is initiated and maintained, and protects the thing from physical injury. On the other

hand, the rights of personal security, life, liberty, bodily security, and reputation, are protected rights only.

The protection is given mainly by imposing duties on other people, whose due performance will or probably will bring into existence or preserve from impairment the protected state of fact. Such duties correspond to the rights. Not every duty corresponds to every right. Some duties correspond to many rights, others to few; some rights have many duties corresponding to them, others few. To the rights of bodily security and ownership in corporeal things many duties correspond. Almost any kind of conduct which the law forbids, which forms the content of a legal duty, if it results in an interference with another's body or property, gives rise to an actionable wrong. But to such limited rights of mental security as the law recognizes and to the right of reputation only a few duties correspond. Those rights can be violated so as to give rise to a right of action in only a few ways. Generally a merely negligent violation of them will not have that effect. In the case of a contract, only the rights and duties created by that very contract correspond to each other. There is no general rule or principle to determine to what rights a particular duty corresponds or what duties correspond to a particular right. That is determined by purely positive and arbitrary rules of law. Some duties are owed only to the state, others to private persons to whose rights they correspond. But although a duty may be owed to private persons and correspond to rights of a certain kind, it does not follow that it is owed to all persons in particular situations, or is not owed to persons in certain situations. Thus, although most duties to use care correspond to rights of personal security, and all persons have such rights, there is authority for holding that they are not owed to trespassers; and certain of such duties are owed only to persons who are invited.

A protected right cannot be exercised, because there is no act for the holder of it to do. But it can be violated. The violation of a right usually means a right of this kind. Any impairment of the protected state of fact may properly be called a violation of the right, at least if it is produced by the conduct of another person. Usually the word violation is confined to cases where the impairment is produced by conduct which is a breach of some duty that corresponds to the right and is therefore wrongful; but I think it will be more convenient for legal purposes to give the word a wider meaning. In that wider sense the violation of a right is not always

wrongful; as I shall explain below, it takes something more than a violation of right to make a wrong.

When a right is violated by the breach of a corresponding duty, the violation is a consequence of the act, or of the omission of the act, which formed the content of the duty. That violative consequence may or may not be identical with the definitional consequence of the duty. If not, it must be a consequence of the definitional consequence. In duties not to commit trespasses, the consequence which is violative of the right, i. e., physical contact with the body of the injured person or with a thing of his, is the same consequence by which the duty is defined, so that the duty cannot be broken without a violation of the right. The same is usually true of contract duties and rights. In duties of probability, i. e., duties to use due care or not to act negligently, the duty, as has been said, can be broken without any violation of any corresponding right. Thus a duty not to drive dangerously fast in the street corresponds to rights of personal security of persons in the street, which right is violated if the vehicle runs into a person. But the immediate definitional consequence of the duty is merely the motion of the vehicle, and that can be produced, and thus the duty broken, without any violation of the right. However, the contact of the vehicle with a person's body, which is the violative consequence of the right, is what was called above the ultimate definitional consequence of the duty. Usually, in this class of duties, the consequence that is violative of the right is the ultimate definitional consequence of the duty; as also in duties of intention. But that is not true of all duties. For instance, a statutory duty to label a poisonous drug, when sold, with the word 'Poison,' if such a duty is owed to private persons at all, corresponds to rights of personal security, which right is violated if a person taking the drug by mistake for a harmless medicine is injured thereby. But the definitional consequence of the duty is simply and only the presence of a proper label on the bottle. The prevention of consequences which would be violative of the right is the reason for creating such a duty; but the definitional consequences of the duty itself are defined by the law absolutely and not by any reference to possible effects upon persons.

Facultative Rights. Sometimes persons are vested by the law with powers to do something that without special authority would be legally impossible, e. g., to become a corporation. Such a power is usually spoken of as a right. We say that by complying with certain requirements prescribed by statute, persons acquire a right

to incorporate. A facultative right is a power to do something that otherwise is legally impossible. Not a permission to do something that would be possible but illegal; that would be a permissive right; but something otherwise legally impossible. So a power of appointment is a power to say who shall have property which does not belong to the power-holder. Generally, a person can not so dispose of another's property. Sometimes such a right can be exercised by the mere act of the holder of it, as is the case with a power of appointment, and sometimes only by a proceeding in court, as is the case with a maritime lien, which is a mere facultative right to dispose of the res. This class of rights have acts for their contents, and can be exercised but not violated.

Rights are in rem or in personam. Those names are badly chosen and inappropriate. Perhaps in an arrangement of the law it would be better to discard them and substitute some more appropriate ones. A right in rem, which need not be a right in or to a thing, is one that avails against all persons; as is commonly said, against all the world. In the case of a protected right, this means that all other persons have duties corresponding to the right and owed to the holder of it. But it does not follow that all other persons owe the same duties. There are certain duties which correspond to right in rem, which are very general in their character and rest upon all persons, such as duties not to commit trespasses, not to make fraudulent misrepresentations, or not to do negligent acts. But duties as to negligent omissions, duties to take active precautions against harm to others, do not rest upon persons generally, but only upon persons in particular situations. The general rule is that a person need not do acts for others' protection. Yet such duties, when they do arise, may correspond to rights of personal security and property, which are rights in rem.

Rights in personam avail only against specific persons, and the corresponding duties rest only on such persons. A protected right of this sort with its corresponding duty, that is, the legal relation, 'juris vinculum,' between two parties, which from the side of one party is a duty and from the side of the other is a right, is called in the civil law an obligation. A contract right and duty is an important kind of obligation; but there are also non-contractual obligations, which in our law are often said to arise from quasi-contracts—a most unfortunate expression, which had its origin in a misunderstanding of the obligations 'quasi ex contractu' of the Roman law. Some facultative rights are also rights in personam, e. g., equitable liens.

In relation to the arrangement of the law the distinction between rights in rem and in personam is of great importance, for the following reasons: The states of fact which form the contents of rights in rem are all defined by the law, are few in number, and can be enumerated and defined without any reference to the corresponding duties. So the corresponding duties can be enumerated and defined separately from the rights sometimes without any reference at all to the rights and sometimes with only a general reference, without particularizing the precise violation of the right which will be definitional of the duty. Also, since the same right may have many duties corresponding to it, it is more convenient to define the right once for all in a separate place from the duties. Otherwise it would be necessary to repeat the definition in connection with each duty. The rights must be classified and arranged according to their contents, as rights of personal security, rights in the persons of others, property rights which are rights in corporeal or incorporeal things, and the right of pecuniary condition which is a right separate and distinct from the right of property, having fewer duties corresponding to it, whose content is the total value of a person's belongings and of which pecuniary loss is a violation, whereas property rights refer to the possession and physical condition of things. Those are all the rights in rem that the law recognizes. Duties must also be classified according to their contents, which, however, gives a very different kind of arrangement from that of rights. Accordingly, in that part of the arrangement which deals with duties and rights, rights in rem and their corresponding duties should occupy different places. But in the case of obligations the contents of the rights and the duties are infinitely varied, being in the case of contract obligations whatever the parties choose to make them, and the duty and the right can not usually be conveniently separated. The definitional consequences of the duty usually can not be defined without at the same time defining the right, or the content of the right without practically defining the duty. Obligations and all rights in personam should therefore be put separate from rights in rem and their corresponding duties, and can be most conveniently classified according to the facts from which they originate, the most important distinction here being that between obligations which arise from contracts and those that arise from other acts and circumstances.

Wrongs in the private law, which are what I am here considering, that is, civil injuries—the following analysis does not fully apply to crimes—have the following elements:

1. There must be a breach of duty. A violation of right not resulting from a breach of duty is *damnum absque injuria*.

2. There must be a violation of right. A mere breach of duty, e. g., a negligent act from which by good luck no harm results, or a fraudulent misrepresentation which is not believed and acted upon, is not by itself a wrong.

3. The duty broken must have corresponded to the right violated and been owed to the party complaining. For example, if a tramp steals a ride on a railroad train and is hurt in a collision due to the negligence of the railroad company, he has no remedy; no wrong has been done him. The company's negligence was a breach of duty, and the tramp's right of personal security has been violated, but the duty to use care was not owed to him.

So if a building which is insured against fire is negligently burned by a stranger's act, the insurance company, although the pecuniary loss thus caused is a violation of its right of pecuniary condition, has no action against the stranger, the duty not to do negligent acts not corresponding to that right. It does correspond to rights of property, but the company has no property right in the building. But if the stranger had burned the building with a malicious intent thereby to injure the company, I think that the company could have an action, because the duty not to do malicious acts does correspond to the right of pecuniary condition.

4. The violation of right must be the actual consequence of the breach of duty, and also a proximate consequence. It may be an actual consequence without being what the law calls a proximate consequence.

When a wrong has been committed, the injured party in an action for the wrong may sometimes recover compensation for further injurious consequences. These are called consequential damages. Consequential damages usually consist of violations of rights; but such violations, which are not a part of the wrong but are extraneous to it, and are not essential to the right of action but only affect the measure of damages, must be distinguished from the violation of right that is an essential element in the wrong itself. The rule that the duty broken must correspond to the right violated does not apply to such violations of rights as merely constitute consequential damage. However, it should be noted that when the essential violation of right is only an indirect consequence of the breach of duty, e. g., when the form of action should be case and not trespass, that violation itself is sometimes called consequential damage.

Under the title of Wrongs in a systematic arrangement of the law much less would be included than is generally considered to fall under that head. A writer on law at present who sets out to describe a particular wrong, say trespass or conversion, usually includes in his discussion all the elements of the wrong. Expressly or by implication he describes the duty and how it can be broken, and the right and how it can be violated. But in a systematic arrangement of the law, those matters would go elsewhere, under the titles of duties and rights. So in describing the group of wrongs usually included under the name of negligence, he would not only specify in what cases the law forbade negligence or enjoined care—it does not always; there are cases where a person may be as negligent as he pleases—which belongs under the head of duties, but also he would define what that kind of conduct or that attribute of conduct which is denoted by the name negligence is in itself, the nature of negligence, which definition is not properly a part of the law of wrongs, but belongs in a more general part of the law. The nature of negligence is a *præcognoscendum* which must be understood before we can define any duty not to act negligently or any negligent wrong. Under the title of Wrongs would properly fall the general rules that to make a wrong the above mentioned elements must be present and certain presumptions as to the existence of those elements; also certain rules as to the identity of wrongs, whether in a given case one wrong or more than one has been committed; and rules as to the locality of wrongs, where a wrong should be deemed to have been committed when its elementary facts have happened in different places.

Also there are certain wrongs, certain particular combinations of the essential elements of a wrong, which have received special names, such as trespass, conversion, libel or slander. Those combinations must be described. For instance, in the wrong called conversion any one of several different duties may be broken. But any one of those duties may be broken so as to give rise to a wrong of quite a different kind. The right violated is always some property right that includes the right of present possession; but there are various property rights of that sort, and any one of them may be violated so as to produce a different kind of a wrong. Conversion depends upon the presence of a special element which need not be present in every case where such a duty is broken or such a right violated. In the discussion of conversion under the head of wrongs, it would be necessary to state what the duties are whose breach may be an element in the wrong and what the rights are whose

violation may be an element. But mere mention would be enough, the duties and rights having been fully described elsewhere. The only thing that would need to be fully described would be that special element which is the 'differentia' of a conversion.

When a wrong has been committed, a remedial or secondary right, a right to some kind of a remedy, usually arises in favor of the injured person. A right not so arising, a right which exists antecedently to any wrong being done, is called an antecedent or primary right. This leads to a division of the substantive law into antecedent and remedial law. The subject of remedial rights and remedies belongs to the substantive law, not to the adjective. The rules of the substantive law decide whether any remedy can be had for a wrong, and, if so, what kind of a remedy, whether, for instance, a decree for a specific performance or only a judgment for damages can be had when a contract has been broken. It having been decided that a certain remedy can be had, then and then only the adjective law comes in to direct how to proceed to get the remedy.

It is evident from what has been said that the main part of the private substantive law must be arranged under the four heads or titles of Duties, Rights, Wrongs, and Remedies.

But there is a considerable part of that law that does not expressly and directly concern itself with any of those four things, and is not in form mandatory. It consists of definitions of certain concepts which are to be used in describing duties, rights, wrongs, and remedies, or of general rules in the nature of more extended and elaborate definitions. Therefore, there will have to be a preliminary part of the arrangement devoted to definitions and general principles, wherein must be defined such conceptions as person, thing, fact, act, consequence, proximate consequence, duty, right, wrong, intention, malice, negligence, reasonableness, probability, possession, juristic act, contract, and many others. Here would fall, too, in connection with persons, rules as to presumptions of life and death, and as to kinship, and in connection with most of the other conceptions there defined various rules of an analogous nature. In the case of contracts, the definition of a contract, how a contract is made, and most of what is usually included under the law of Contracts should fall here, but the contract obligation should be discussed elsewhere. Here, as elsewhere, the question where a particular rule or principle should go may sometimes have to be decided on mere grounds of practical convenience.

There are certain classes of persons whom the law treats in

some respects differently from persons in general. These include abnormal persons who have such numerous and important personal peculiarities as to make special rules for them necessary, such as infants, persons non compos mentis, and corporations. There is no general test to distinguish normal from abnormal persons. Much labor has been wasted in vain attempts to find such a test. It is a pure question of convenience. Besides abnormal persons, persons who may be quite normal may stand in special relations that call for special treatment, such as the relations of husband and wife or parent and child. Then there are certain classes of persons who present no abnormalities and whose duties and rights are all such as are described in the general part of the law, who have no duties or rights which are different in kind from those of people in general, but for various reasons it is more convenient to treat of their duties and rights all in one place. Among these are principals and agents, masters and servants, carriers, and persons carrying on certain other trades and occupations. This leads to a division of the law into two parts: the law of persons in general, and the law of special classes of persons.

The arrangement indicated by what has been said can be shown in tabular form, as follows.

THE PRIVATE SUBSTANTIVE LAW

First. The Law of Persons in General.

I. The Antecedent Law.

1. Definitions and General Principles.

2. Rights and Duties.

(a) Rights in rem.

(b) Duties corresponding to rights in rem, and exceptions to those duties.

(c) Rights in personam and their corresponding duties.

(1) Legal obligations.

(2) Equities, which are either equitable obligations or equitable liens, the latter being facultative rights.

3. Wrongs.

II. The Remedial Law.

Second. The Law of Special Classes of Persons.

SHOULD AMERICA RETURN PRIVATE GERMAN PROPERTY?

By A. W. LAFFERTY

International law has neither courts nor marshals. It depends upon honor alone for obedience to its decrees.

That which is naturally right, obviously just, is counted as the *voluntary law of nations*, because all nations are supposed voluntarily to abide by it. Those particular modes of intercourse between nations, not inconsistent with natural right, and which have been generally observed for long periods of time, constitute the *customary law of nations*. Those matters of common benefit which have been mutually agreed to by particular nations through treaty compact, constitute, as between them, what is known as the *conventional law of nations*. These three kinds of international law embrace the whole of the subject.

A nation which has the physical power may disregard all international law. It may even break its treaties with impunity. The only redress for wilful breach of treaty is a declaration of war, and if the opposite party to the treaty is too weak to resort to arms there is no remedy.

The United States has never yet breached its bond. There is no likelihood that it ever will. Its traditions are too well established. Its national character has been hallowed by the immortal spirit of a Washington, a Franklin, a Hamilton, a John Marshall, and a Lincoln. Its institutions have been made sacred by the blood of our heroic armies of the Revolution, of the war for the preservation of the Union, and of our last and greatest army, the American expeditionary force, which at the cost of 60,000 lives and 100,000 additional broken bodies, turned the tide of battle and resulted in the destruction of the monster of militarism.

We must now make peace with a vanquished, a defeated, and a broken Germany. We hold upwards of \$700,000,000 worth of private property which we found in this country, belonging to individual German citizens residing in their own country at the outbreak of the war, and still residing there. We did not take over the property of individual German citizens residing in America.

International law recognizes a clear right on the part of belligerents, after war starts, to interdict all trade and communication

with the enemy. It recognizes the right to capture the ships and the property of the enemy upon the high seas, engaged in such trade, as prizes of war, and to confiscate the same. In such case the enemy forfeits his property because he has, since the war started, been engaged in trading with the enemy, to the detriment of the belligerent making the capture. The forfeiture is properly visited upon him for helping the enemy by attempted trading during hostilities.

But the rule is quite different as to individual property of an enemy found on land within the boundaries of a belligerent, which property was lawfully brought there, purchased there, or produced there, before the war. The belligerent has a clear and universally recognized right to prevent any such property leaving its boundaries and going to enrich the resources of the enemy during the war. It follows that the belligerent has the clear right to sequester such property, and hold it under government control during the war. But has a belligerent the natural right, or a right by the customs and usages of war, to confiscate such property outright at the end of the war?

It is a universally recognized principle of international law that a belligerent may take any of the property of an enemy, necessary in the prosecution of the war, on making due compensation. This principle is relevant in connection with the taking over of the German merchant ships found in our harbors at the outbreak of the war, and the taking of the docks and wharves on the Hudson River at New York.

The individual German property which we have taken over was taken under three separate and distinct acts of Congress. The German ships in our harbors were taken by authority of the act of May 12, 1917,¹ which act authorized the President to take over the possession of, and title to, the vessels, and to "operate, lease, charter, and equip" the same in any service of the United States, foreign or domestic. The same act directed the Secretary of the Navy to cause the vessels to be appraised by a board of survey, whose findings should be "competent evidence in all proceedings on any claim for compensation."

The Shipping Board recently advertised some of these vessels for sale. On suit of a private citizen, the Supreme Court of the District of Columbia permanently enjoined such sale on the ground that it was unauthorized by any act of Congress. Previously, by

1. 40 Stat. L. 75.

order of the President and the Shipping Board, a portion of the fleet had been turned over to Great Britain. This action, so far as the writer has been able to find, was also unauthorized by any act of Congress or by law.

The North German Lloyd and Hamburg-American Line docks at New York were taken over by the President by authority of the act of Congress of March 28, 1918. In the proclamation taking same over, the value of the docks of the first-named company was fixed at \$4,831,705 and the latter at \$2,314,877.

The third and largest group of individual German property found in this country at the outbreak of the war, and taken over by the Government, was taken over by and is now held by the Alien Property Custodian, under the act of Congress of October 6, 1917. It is of this group of property, and the probable future disposition of the same by Congress, that I shall principally speak. The total amount taken over by the custodian has a valuation of approximately \$700,000,000. The custodian has sold and converted into cash approximately \$100,000,000 worth of this property, under authority of the act of Congress of March 28, 1918, and holds the proceeds of such sales.

The act of October 6, 1917, under which this property was taken over, is called the Trading with the Enemy Act. However, the property taken over by the Alien Property Custodian was not seized because found in the channels of interdicted trade, but was taken for the purposes of safekeeping and to make sure that it would not be later placed in the channels of interdicted trade by an attempt to transmit it to the enemy during the war.

The debates in Congress and the Committee Reports of both the House and Senate show beyond doubt or question that it was the intention of Congress that this individual German property should be merely held in custody during the war, or its proceeds, where sold, and that after the war the property or its proceeds would be returned to the German owner.

Brief quotation will first be made from the debates. Representative Montague, of Virginia, former governor of that state and a very able lawyer, was in charge of the bill on the floor of the House. The following colloquies were had between Mr. Montague and Mr. Hill of Connecticut²:

Mr. Hill. "Then, as I understand it, it is practical confiscation now, but subject to the courtesy and kindness of Congress after the war is

2. Vol. 55, Part V, Cong. Record, 1st Sess. 65th Cong., pages 4844 and 4845.

over, so far as actual money is concerned, but giving a legal right to recover in case of patents."

Mr. Montague. "Not confiscation at all. The government will act, if I may use the legal term, as bailee. It will take this property and invest it in the best security in the world. It will take property which does not belong to debtors in this country, and who may not be solvent at the end of the war, and hold it for final disposition after the war. In other words, the government undertakes to do by these enemy creditors better than the resident debtors or such enemy creditors could do for themselves."

Mr. Hill. "That might be. I do not want to take the gentleman's time, but I want an understanding of this situation, because it is true that we shall in the future, as in the past, probably be applicants for the investment of foreign funds in the development of the industries and the railroad situation of the country, and no one needs it more than the railroads do now. What position are we going to be in if we confiscate the stocks and bonds owned abroad and put the dividends and interest into the Treasury of the United States to hold, to invest, to sell, and make no provision whatever at the time we do it that there shall be at least a prescribed legal way for the owner to come back and make claim against the United States."

Mr. Montague. "If the act does not permit the debtors of these authorizations confiscation is a violent one."

Mr. Hill. "I want this country to so fairly and justly protect the foreigner that in the years to come, when we go, as individuals and corporations, in your state and my state, and other states of the Union will go, to Europe to solicit funds, as they have done in the past, we will not be met with the reply that we have confiscated property."

Mr. Montague. "If the act does not permit the debtors of these dividends to retain them there is no injury to their rights, for their right is to pay it over to the owner, and when that owner is an enemy the government steps in to forbid such payment."

Mr. Hill. "Of course, there is not, but it is an injustice for the Secretary of the Treasury to have authority to invest in any form that he sees fit in government funds, and then not return that money when the war is over until Congress shall provide how it shall be done or whether it shall be done at all or not."

Mr. Montague. "Of course, the gentleman may take a case that he feels would be better conducted by doing as he suggests, but all of these debtors are not Pennsylvania railroads. No one can foretell the status of business in the era now facing us, and therefore I submit that if the United States should become the custodian of this property it would protect rather than jeopardize the interests of the enemy creditors."

Mr. Hill. "Why not permit it to be placed in the bill, and not say, as this bill does, that we will invest it for our own benefit, and perhaps, by and by, five years from now, after the war is over, Congress may take some action for their relief?"

Mr. Montague. "My individual views are that by impounding this property it is made to serve the interests of America in this great struggle, and, at the same time, its final and honest payment to the creditor is made more secure."

The Committee Reports of both the House and Senate on the bill confirm the statements made by Governor Montague on the floor of the House as to the theory of the legislation.

The House Report says³:

"Moreover, the preservation of enemy property by governmental agencies is to the best interest of the enemy subject himself. The fortune of trade in time of war renders precarious the solvency of debtors or holders of property, and the assumption of the debt or custody of the property by the government gives the enemy, or ally of enemy, the best possible protection."

The Senate Committee Report⁴ is even stronger in supporting the theory of the proposed law as enunciated by Governor Montague. It says:

"Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it . . . The most novel and important feature of this position of the bill is the requirement that all money and quick assets paid over to the government shall be invested in United States bonds. So far as known, this is an entirely new provision, contained in no previous statute. It is in line, however, with the modern and advanced lenient policy with reference to private property in time of war. By this means enemy property is temporarily conscripted by the government to finance the government through investment in these bonds, and to be paid back to the enemy or otherwise disposed of at the end of the war, as Congress shall direct. In other words, we fight the enemy with his own property during the war, but we do not permanently confiscate it. This temporary conscription of enemy property is also conservation of enemy property, for it takes the property from the hands of debtors or agents, as to whose solvency the enemy would otherwise be obliged to assume the risk, and it invests the property in the safest security in the world—bonds of the United States—or deposits it in government depositories."

What is recognized as the leading case in America on the subject of confiscation of enemy property is that of *Brown v. United States*.⁵ In that case the United States District Attorney for the District of Massachusetts filed a libel against a quantity of lumber

3. H. Rept. No. 85, 65th Cong., 1st Sess.

4. S. Rept. No. 113, 65th Cong., 1st Sess.

5. 8 Cranch 109.

at New Bedford, setting up that it was enemy owned and asking its condemnation to the United States. Chief Justice Marshall, who wrote the majority opinion, held that war gave to a country the power to confiscate private property, if its sovereign should so elect, but that as Congress had not passed any law authorizing confiscation the bill would have to be dismissed. The great jurist also expounded the modern rule of international law against the confiscation of private property.

Chief Justice Marshall said:

"Respecting the power of government, no doubt is entertained. That war gives the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

"Chitty, after stating the general right of seizure, says: 'But, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities.' The modern rule, then, would seem to be that tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated; and, in almost every commercial treaty, an article is inserted stipulating for the right to withdraw such property."

Near the conclusion of his decision, adverting again to the modern rule by which sovereigns usually refrain from confiscating private property, notwithstanding the fact that they have the power so to do, Chief Justice Marshall says:

"This usage is a guide which the sovereign follows or abandons at his will; the rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."

In the case of *Ware v. Hylton*,⁶ Mr. Justice Wilson, in a concurring opinion, said:

"When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable; and we know that not a single confiscation of that kind stained the code of any

6. 3 Wallace 198.

of the European powers who were engaged in the war which our revolution produced. Nor did any authority for the confiscation of debts proceed, from Congress (that body which clearly possessed the right of confiscation as an incident of the powers of war and peace), and, therefore, in no instance can the act of confiscation be considered as an act of the nation."

Mr. Justice Field, in reviewing the authorities, in *Briggs v. United States*,⁷ said:

"In *Brown v. United States*, 8 Cranch 110, 122, 123, the court said that it was conceded that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, and observed that the mitigations of this rigid rule, which the humane and wise policy of modern times had introduced into practice, might more or less affect the exercise of this right, but could not impair the right itself.

"Substantially the same thing was said in *Young v. United States*, 97 U. S. 39, 60: 'All property,' was the language of the court in that case, 'within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture.'

"But in another case, that of *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, this court said 'that this rule as to property on land has received very important qualifications from usage, from the reasonings of publicists, and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of war," and excluding in general "the seizure of private property of pacific persons for the sake of gain."'"

Mr. Justice Clifford, in *Hanger v. Abbott*,⁸ said:

"In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."

The great masters of the subject of international law, beginning with Grotius,⁹ and followed by Pufendorf,¹⁰ Bynkershoek,¹¹ Vattel,¹² and Wheaton,¹³ all agree that the ancient principle of the law of war which permitted the confiscation of the individual property of the enemy had its origin with the Romans, who considered it proper

7. 143 U. S. 346.

8. 73 U. S. 532.

9. Grotius, "De Jure Belli ac Pacis," 1625.

10. Pufendorf, "De Jure Naturae et Gentium," 1672.

11. Bynkershoek, "Quaestiones juris publici," 1737.

12. Vattel, "Le Droit des Gens," 1773.

13. Wheaton, "Elements of International Law," 1836.

to enslave, and even to kill, an enemy found within the territory of a state on the breaking out of war. None of the masters of international law, as named here, was German, although some of the names might so indicate. The first three were Hollanders, Vattel was Swiss, and Wheaton was an American.

The most powerful argument ever made by a single individual against the confiscation of private property in case of war is that made by Alexander Hamilton in the famous "Camillus" letters in defense of Article 10 of the Jay Treaty.¹⁴

Justice Story, in *Brown v. United States*,¹⁵ in speaking of the Hamilton letters, says:

"I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure, not as of strict right, but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable."

It will be observed that Justice Story, although upholding the strict right of America to confiscate individual enemy property if it wanted to do so, yet believed that as a matter of sound policy and national honor there was an unanswerable argument to be made against it.

Following the Revolutionary War, Congress appointed John Adams, Benjamin Franklin, and Thomas Jefferson, joint commissioners, to negotiate commercial treaties with the different nations of Europe. The commission was convened at Paris, and overtures were made to the different powers through their ministers residing there. The only treaty which immediately resulted was the one with Prussia of September 10, 1785.¹⁶

Speaking of this treaty in the *Paquette Habana*,¹⁷ Mr. Justice Gray said:

"In the treaty of 1785 between the United States and Prussia, article 23 (which was proposed by the American commissioners, John Adams, Benjamin Franklin, and Thomas Jefferson, and is said to have been drawn up by Franklin) provided that if war should arise between the contracting parties 'all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue in their respective employments, and shall not be molested in their persons; nor shall their

14. "Camillus Letters," 18 to 22: *Hamilton*, "Works," Vol. V.

15. 8 Cranch 109.

16. 8 Stat. L. 84.

17. 175 U. S. 677.

houses or goods be burnt or otherwise destroyed, nor their fields wasted, by the armed forces of the enemy, into whose power by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price': 8 Stat. 96; 1 *Kent* "Com." 91 note; *Wheaton's* "History of the Law of Nations," 306, 308. Here was the clearest exemption from hostile molestation or seizure of the persons, occupations, houses, and goods of unarmed fishermen inhabiting unfortified places. The article was repeated in the later treaties between the United States and Prussia of 1799 and 1828: 8 Stat. 174, 383."

The treaty between the United States and Prussia of May 1, 1828, being the last treaty cited by Justice Gray, was still in force when the recent war with Germany was declared.

This treaty provides, in addition to the portion quoted by Justice Gray, the following:

"If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance."

And also the following:

"And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations."

The first inquiry which naturally presents itself in view of the provision respecting merchants residing in either of the countries is this: Does this provision extend any protection to the owners of property who are not present, but absent? And if not, why this discrimination?

Upon the precise point here involved the language of Chief Justice Marshall, in *Brown v. United States*,¹⁸ although not used in reference to this treaty, is very illuminating, as follows:

"Nor can reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of a nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others."

The particular treaty provision last referred to was undoubtedly inserted to encourage the merchants of the two countries to

18. 8 Cranch 109.

go freely into the territory of the other and open branch houses and transact business. It was to encourage commerce. It was an assurance that such business would be safe in case of war, and that such merchants would be enabled to close up their business and take their property away with them notwithstanding the rule of international law that all trade or communication with the enemy is interdicted from the date war begins.

But the spirit of the provision undoubtedly would exempt investments and other property, not accompanied by the owner, from confiscation. The latter, indeed, would have even placed more faith and reliance in the country than the merchant who accompanied his property to personally manage the same.

It cannot be said that the German who invested his money in an American corporation, managed by Americans, is less entitled to protection of his property than would be the German who invested his money in an American business personally managed by himself. It is conceivable that the two governments might by treaty protect the one and not the other. But would it be just for Congress to confiscate the American investments of German citizens living in Germany if it be conceded that by treaty we have exempted from confiscation the American investments of Germans who came here personally to manage the same?

Our treaty provision with Prussia here referred to does not by any means stand alone. We have practically the same provision in treaties with Great Britain, France, Holland, Sweden, and Morocco, all concluded shortly after the Revolution.¹⁹

Our Supreme Court has never so much as expressed a doubt as to the binding force of the enemy property provisions of these treaties. Indeed, there can be no doubt as to the faithful fulfillment by the United States of all of its treaty compacts. To repudiate them is unthinkable. It is quite true that any nation has the right to refuse to abide by a treaty provision if the opposite party to the treaty has first breached it. In such case refusal to comply is just, and is not in any sense repudiation.

Justice Story in *Brown v. United States*²⁰ speaks directly of the enemy property provisions in our various treaties, and holds that they are binding, as follows:

"The stipulations of particular treaties of the United States have been cited, in corroboration of their general doctrine, by claimant's counsel. These treaties certainly show the opinion of the government

19. Set out in full in 8 Stat. L.

20. 8 Cranch 109.

as to the impolicy of enforcing the right of confiscation against debts and actions. See treaty with Great Britain, 1794, art. 10; with France, 1778, art. 29; with Holland, 8th October, 1782, art. 18; with Prussia, 11th July, 1799; art. 23; with Morocco, 1787, art. 24. But I cannot admit them to be evidence for the purpose for which they have been introduced. It may be argued, with quite as much, if not greater, force, that these stipulations imply an acknowledgment of the general right of confiscation, and provide for a liberal relaxation between the parties. I hold, with Bynkershoek (*"Quaest. Pub. Jur.,"* ch. 7), that where such treaties exist, they must be observed; where there are none, the general right prevails."

The point that had been urged on the court in the case last cited was that the special treaty provisions referred to showed that the general principle of confiscating individual enemy property had been abandoned. Justice Story denied that the right to confiscate had been abandoned as a matter of international law, but affirmed that where the right of confiscation had been surrendered in any specific instance by treaty stipulation, such treaty provision must be observed.

Article 10 of our Treaty of Commerce and Navigation with Great Britain, concluded November 19, 1794, commonly called the Jay Treaty, provides:

"Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences or discontents."

It will be seen that in the foregoing provision Great Britain and the United States did more than make an agreement. In the most solemn and formal manner possible they pronounced their views that it is both unjust and impolitic that private investments of enemy subjects should be confiscated in case of war.

In speaking of article 10 of the Jay Treaty, in *"Camillus"* letter 18, Hamilton said:

"No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse in time of peace, has been confided to the faith of our government and laws, on account of controversies between nation and nation. . . .

"It would have been an inestimable gem in our national Constitution had it contained a positive prohibition against such a practice, ex-

cept, perhaps, by way of reprisal for the identical injury on the part of another nation. . . .

"There is, indeed, ground to assert that the contrary principle would be repugnant to that article of our Constitution which provides that 'no state shall pass any law impairing the obligation of contracts.' The spirit of this clause, though the letter of it be restricted to the states individually, must, on fair construction, be considered as a rule of the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war. But it is a pity that so important a principle should have been left to inference and implication, and should not have received an express and direct sanction.

"This position must appear a frightful heresy in the eyes of those who represent the confiscation or sequestration of debts as our best means of retaliation and coercion, as our most powerful, sometimes our only, means of defense.

"But so degrading an idea will be rejected with disdain by every man who feels a true, well-informed national pride; by every man who recollects and glories that in a state of still greater immaturity we achieved independence without the aid of this dishonorable expedient; that even in a revolutionary war, a war of liberty against usurpation, our national councils were too magnanimous to be provoked or tempted to depart so widely from the path of rectitude; by every man, in fine, who, though careful not to exaggerate, for rash and extravagant projects, can nevertheless fairly estimate the real resources of the country, for meeting dangers which prudence cannot avert.

"Such a man will never endure the base doctrine that our security is to depend upon the tricks of a swindler. He will look for it in the courage and constancy of a free, brave, and virtuous people—in the riches of a fertile soil—an extended and progressive industry—in the wisdom and energy of a well-constituted and well-administered government—in the resources of a solid, if well-supported, national credit—in the armies which, if requisite, could be raised—in the means of maritime annoyance, which, if necessary, could be organized, and with which we could inflict deep wounds on the commerce of a hostile nation. He will indulge an animating consciousness that while our situation is not such as to justify our courting imprudent enterprises, neither is it such as to oblige us, in any event, to stoop to dishonorable means of security, or to substitute a crooked and piratical policy for the manly energies of fair and open war."

It is, however, in "Camillus" letter 19 that Hamilton uses his most powerful argument in support of the proposition that nations have no natural right to confiscate individual enemy property found within their boundaries in case of war, as follows:

"The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property with-

in its territories, or to bring and deposit it there, it tacitly promises protection and security. . . .

"The property of a foreigner placed in another country by permission of its laws may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner when he has personally given no cause for its deprivation? . . .

"Moreover, the property of the foreigner within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of war, the confiscation of property which, during peace, serves to augment the resources and nourish the prosperity of a state?"

In other portions of the "Camillus" letters Mr. Hamilton analyzes the texts of Grotius, Bynkershoek, and Vattel. He denies that modern international custom and usage permits the confiscation of individual enemy property found in a state on the outbreak of war, and he criticises the authors for having borrowed this principle from ancient Roman law and setting it down as still an existing right of international law.

It is quite true that the right of confiscation of such property has not been recognized in practice for the past three centuries. It would seem, therefore, that it is, as Hamilton contends, obsolete, and no longer a part of the international law derived from usage and custom. It is no longer the custom.

The late text writers seem to agree with this view. Hall's *International Law*²¹ states the rule as follows:

"Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always now be looked upon with extreme disfavor, it would be unsafe to declare that it is not within the bare rights of war."

Wheaton²² says:

"It appears, then, to be the modern rule of international usage that property of the enemy found within the territory of the belligerent state, or debts due his subjects, by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated

21. Sixth ed., p. 431.

22. *Op. cit.*, Part. 4, ch. 1.

as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced it cannot be considered as an inflexible, though an established, rule. 'The rule,' as it has been beautifully observed, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.'"

The quotation used by Wheaton is from the decision of Chief Justice Marshall, in *Brown v. United States*.²³

My conclusions, from all the authorities, are these:

1. That under the present rule of international law, as evidenced by custom and usage for at least three hundred years, we have no right to confiscate individual enemy property found in America at the outbreak of hostilities.

2. That article 23 of our treaty with Prussia, while in terms protecting only the property of German merchants residing in America at the outbreak of the war, in spirit equally protects all individual German investments found here when war began.

3. That if Congress should now pass an act confiscating such individual enemy property, or the proceeds thereof, or if we should do so under the enforced terms of a new treaty, it would violate established international law, and it would violate at least the spirit of our former treaty assurances.

During the American Civil War Congress passed two acts respecting enemy property,²⁴ but neither of these acts provided for gratuitous confiscation. They did provide for the forfeiture of property for specific wrong, for treason against the government, or for intentionally giving or using property in aid of insurrection.

In conclusion, I desire to advert briefly to the Treaty of Versailles, which has not at the time of the writing of this article been ratified by the United States.

Article 297 of the treaty provides that the Allied and Associated Powers reserve the right to retain and liquidate all individual German property.

It will be seen that this provision still does not actually confiscate such individual property, but merely reserves the right so to do. Therefore, if the treaty should be ratified by the United States, it would still be for Congress to say what shall be done with individual German property held in America.

23. 8 Cranch 109.

24. Act of Aug. 6, 1861, 12 Stat. L. 319, and Act of July 16, 1862, 12 Stat. L. 589.

Subdivision (i) of the same article of the Versailles Treaty provides that Germany undertakes to compensate her nationals for all property, rights, or interest retained in Allied or Associated states.

The question will arise, if this or a similar treaty provision shall be ratified as between the United States and Germany, whether Congress would then be justified, under the rules of international law, in confiscating the individual German property now impounded in the United States, and remitting the owners to such claims as they may be able to enforce against the German government.

This question must be emphatically answered in the negative. Since, under the rules of international law, we have no right to confiscate the property, we must return it in kind wherever possible, and we must return the proceeds in other instances. It would, indeed, be a feeble recognition of our duty were we to leave it to the German government to perform it for us. Our duty to individual German property owners, with respect to their property lawfully invested in this country when war began, is to the individual and not to the government of the individual.

In "Camillus" letter 19, upon the point now under consideration, Hamilton says:

"When it is considered that the promise made to the foreigner is not made to him in the capacity of a member of another society, but in that of citizen of the world, or of an individual in the state of nature, the infraction of it towards him, on account of the fault, real or pretended, of the society to which he belongs, is the more obviously destitute of color. There is no real affinity between the motive and the consequence. There is a confounding of relations. The obligation of a contract can only be avoided by the breach of a condition expressed or implied which appears or can be presumed to have been within the contemplation of both parties, or by the personal fault or crime of him to whom it is to be performed."

If it is our duty, under the rules of international law, to restore to individual German citizens their property found invested in America at the outbreak of the war, not to mention the spirit of our commercial treaty, then I say we cannot perform that duty by saying we will confiscate the property either by a new treaty or by an act of Congress, or both, and by exacting at the same time a promise from the German government to reimburse such property owners for what we have taken. That would not be living up to our duty. The German government might or might not deal fairly and promptly with these individual property owners. We can no

more escape our duty to these individual property owners by shifting our obligation to the German government than we could by shifting it to the government of Morocco, or any other government.

Besides, there is no principle of law better settled than that when a man is entitled to property he should have the specific property, wherever possible, and not its equivalent in cash. The law presumes that the owner may have set his affections on the particular stock, or bond, or other property, and if he is entitled to it at all, the law will give it to him in kind if the property be in existence.

The responsibility of settling this question rests squarely upon Congress. If such peace treaty as shall finally be adopted reserves the power to Congress to do as it sees fit with private enemy property impounded here, or even assumes to confiscate it, still it will be within the power of Congress to provide for its immediate restitution to its owners if it wishes to do so. The courts are not likely to give the German property owners any relief. This is true even though the mandate of Congress may be contrary to morality and accepted international usage. It is likewise true, even though the mandate of Congress might be in open and direct violation of the express terms of a previous commercial treaty. Innumerable times our Supreme Court has held that the matter of living up to or violating a treaty is a political and not a judicial question. The court is powerless to compel Congress to pass laws to carry out treaty obligations, and it is likewise powerless to render nugatory laws passed by Congress which are contrary to our treaty obligations.²⁵

Our Constitution provides:²⁶

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land"

In the authorities last cited,²⁷ and in an unbroken line of decisions, our Supreme Court has held that under the Constitution a law of Congress has equal dignity with a treaty, and that if an act of Congress, subsequent to a treaty, comes before the court, and is in conflict with the treaty, the court will be bound to enforce the act of Congress and ignore the treaty.

25. *Whitney v. Robertson*, 124 U. S. 190; *Thomas v. Gay*, 169 U. S. 264; *Foster v. Neilson*, 2 Pet. 253.

26. Article 6, clause 2.

27. Note 25 *supra*.

There is, however, one theory upon which the Supreme Court might assume jurisdiction of the controversies which may arise as to the impounded German property, and it is this: The Fifth Amendment to the Constitution, among other things, provides:

"Nor shall private property be taken for public use without just compensation."

Now, if the Supreme Court should decide that we have no right, under the rules of international law, to confiscate private property in this country, then the court might hold that the taking of the individual German property was for a public use and therefore prohibited by the Constitution, except upon due compensation being rendered direct to the owner. Or it might hold that in some instances the property was taken without being needed for a public use, and would therefore have to be returned in kind.

It has often been held that the provisions of our Constitution guaranteeing rights of persons, such as habeas corpus, trial by jury, and all other personal rights, extend to all persons within our boundaries, whether citizens or aliens. It would seem to follow that all "rights of things," as Blackstone puts it, or property rights, guaranteed by the Constitution, would likewise extend to all property within our jurisdiction, whether owned by citizens or aliens.

It is but conservative to forecast that the Supreme Court will in the present instance—destined to become memorable in our annals—follow the reasoning of the great Marshall in *Brown v. United States*,²⁸ and disavow any jurisdiction in itself and accord full and exclusive power to Congress to determine the fate of individual enemy property found invested in the United States at the beginning of the war.

Were it left to the Supreme Court to determine the merits, as many of our people devoutly wish could be the case, there could be no reasonable doubt that full and complete restitution would be promptly made. While heretofore denying its jurisdiction to interfere with any action which Congress may take, the Supreme Court has so often expressed its views against the morality and wisdom of confiscation that those views are now known to the world.

The Supreme Court, although a co-equal branch of the government with the legislative department, has deemed it the part of wisdom to declare in favor of a policy of absolute non-interference with Congress in time of war in dealing with the individual property of the enemy.

28. 8 Cranch 109.

However, I respectfully submit that if a case could be presented to the Supreme Court where it was made to appear that Congress had violated the Constitution, it would then become the duty of the court to assume jurisdiction, for the Constitution is the highest law of the land, in war as well as in peace, and the Supreme Court must always uphold it by its decrees.

Now, it will be conceded that if Congress were to pass a law today confiscating all the property in the United States belonging to alien Swedes, for example, such a law would violate that portion of the Fifth Amendment to the Constitution prohibiting the taking of private property without compensation, and the Supreme Court would not hesitate to decree restitution wherever government officers might seize investments of Swedes in this country under such an act. It surely would be going only a step further for the Supreme Court to review the constitutionality of the same kind of confiscation act were it to be passed at a later date when we had declared war on Sweden. And such, of course, would be an identical case with the one that is now before us with respect to the German investments in the United States, if Congress shall determine to confiscate them.

The primary question before the court, were it to assume jurisdiction to pass upon the constitutionality of such a confiscation act, would be this: Does the Fifth Amendment to the Constitution prohibit the taking, without compensation, of property invested in the United States, notwithstanding the owner is a member of a state against which our country has declared war?

Why should not the Supreme Court assume jurisdiction and pass upon the constitutionality of such a law? The point has never been brought squarely before the Supreme Court, and for the reason that Congress has never yet passed an act confiscating the private investments in the United States belonging to individuals in case of war.²⁹

The question as to whether war per se takes private investments in the United States belonging to alien enemies out of the protection of the Fifth Amendment against confiscation, is one that the Supreme Court may, therefore, assume jurisdiction to pass upon, but, I repeat, it is not likely to do so, and for that reason the responsibility of Congress is all the greater to pass such legislation as will reflect credit not only upon this generation, but upon the many generations which, in the fullness of time, are to follow us.

29. It has provided for forfeiture, for specific offenses, but never for gratuitous confiscation.

After my review of the text-writers of the past four centuries, and of the expressions of our Supreme Court, I am led to the conclusion that no writer has viewed this branch of international law with as clear a perspective as did Alexander Hamilton. All writers agree that the law of nature is the basis of international law. In other words, that which is naturally right must appeal to all nations in dealing with each other. Primarily, they have no other guide. Therefore, that which is in its very nature wrong cannot be said to have the sanction of international law, and cannot be international law. It follows that a barbarous or an immoral practice, no matter how long enforced by strong nations against the weaker, could not become international law.

Upon these considerations I venture to suggest that even when Chief Justice Marshall, following Grotius, Bynkershoek, and Vattel, said that the right of confiscating private enemy property found in a state on the outbreak of war, was an undoubted right under international law, although modern practice had introduced a more humane rule, he fell into an error of nomenclature—the confusion of ancient Roman custom (unwarranted custom) with true international law—which the clear vision of Hamilton escaped. Would it not be more accurate to say that although the Romans asserted and exercised the right to capture and even to kill enemy subjects found in their territory at the outbreak of war, and to confiscate their property, such barbarous practice never had the sanction of international law, and that the “modern practice” mentioned by Chief Justice Marshall is a recognition of what the true international law has always been?

Would it not be but the obvious truth, in the light of all the authorities now before us, to say that the practice of the Romans referred to was carried out, not in accordance with the law of nature, or true international law, but in spite of and in direct violation of the law of nature, or true international law?

Marshall's beautiful expressions in *Brown v. United States*³⁰ show that he did not fail to distinguish in the most powerful manner that which is right from that which is wrong. He held that the lumber found in this country at the beginning of the War of 1812 and owned by enemy aliens could not be confiscated. When he went farther and said that if Congress should pass an act authorizing the confiscation, then it could be confiscated, his expressions were obiter dicta, or, in other words, he was speaking on a

30. 8 Cranch 109.

matter not then before the court for decision, and it may be assumed that he did not give to that phase of the question the same study and reflection that he would have given to it had it been directly before the court. When he did say that the sovereign could not disregard the modern practice of refraining from such a confiscation "without moral obloquy," he left no doubt in the mind of anyone that he felt that Congress should not pass an act confiscating the private investments of enemy subjects found in America at the beginning of the war. Therefore, whether Marshall did or did not err in confusing unwarranted custom with international law, as regards the naked right of Congress to confiscate in the case named, his words stand as an unmistakable guide-post to direct Congress in a righteous course when it shall come to deal with the question.

It goes without saying that all damage done to American citizens during the European war should be exacted from Germany by whatever treaty shall be finally ratified, and we should have reparation, as well as our allies, for our financial disbursements made and to be made on account of the war. But this reparation should come from the German government, from the German nation as a whole, and not from individual German investors who trusted their property to the protection of American commerce and American law in time of peace.

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COMMENT ON RECENT CASES

PAROL EVIDENCE RULE—MISDESCRIPTION OF PREMISES IN A WILL—KURTZ V. HIBNER ONCE MORE.—In *Johnston v. Gastman*, 291 Ill. 516, 126 N. E. 172, it is plain that the rules of *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202 (1919), which was supposed to settle the long controversy over *Kurtz v. Hibner*, 55 Ill. 514 (1870), has in effect settled it, and is destined to work smoothly hereafter. Indeed, on that point, it may even be thought that there was little prospect for counsel in the present case to make a tenable argument on appeal. Thus is the cycle of just fifty years closed since the eminent names of Caton and Redfield were found opposed in the arena of juristic debate.

Kurtz v. Hibner presented the question whether, in a will, a description of premises—e. g., "the S. W. $\frac{1}{4}$ of section 6, township 4, range 1"—which cannot be fitted to any property disposable by

the testator, unless upon omitting some item of description and substituting another—e. g., the N. W. $\frac{1}{4}$ for the S. W. $\frac{1}{4}$ —can be given effect at all, and upon what theory. The theory of the original cases was that any attempt to show a draftsman's error was contrary to a fundamental principle of the parol evidence rule—a sound conclusion. But Judge Redfield, in the *American Law Register*, pointed out another approach, viz.: the principle of 'falsa descriptio non nocet,' i. e., any item of a description can be ignored if enough remains to identify the premises unmistakably, e. g., "being the lot with a big spring," or "being the lot owned by me since 1850," or "being my property."

Judge Caton accepted this principle in full, but insisted on the necessity of at least finding such words expressly in the will; i. e., he refused to accept the doctrine that the words "being my property" can be *implied* into every testator's descriptions. Around this point the controversy finally centered. In the late Professor Schofield's masterly article, "The So-called Equity Jurisdiction to Construe and Reform Wills" (ILLINOIS LAW REVIEW, VI, 485), the subject was fully examined.

Finally, in *Stevenson v. Stevenson*, above cited, the Supreme Court definitely adhered to the principle 'falsa demonstratio non nocet,' but also definitely refused to imply into any description the item "being my property." In that case, no such words were anywhere in the will. But in *Johnston v. Gastman*, the present case, the residuary clause referred to "all the residue of *my* property," which is now interpreted to relate back to the specific devises, so that "*my* property" becomes an item of the description of each of them. Thus the devise can be given effect.

This ought to afford a plain rule for the future. J. H. W.

PUBLIC UTILITIES—POWER OF COMMISSION TO INCREASE RATES FIXED BY ORDINANCE.—In *State Public Utilities Commission v. City of Quincy*, 290 Ill. 360, 125 N. E. 374, the Supreme Court upholds the power of the State Public Utilities Commission to increase the fares of a traction company fixed by the terms of an ordinance, passed prior to the passage of the Public Utilities Act, by the municipality in which the company operated.

The court holds that the state has, as a part of its inherent police powers, the power to regulate the rate of privately owned public utilities. That the power, since it is a part of the general police powers of the state, cannot be bartered away, and that no legislature can forestall or preclude action by a subsequent legislature. That the legislature has never clothed municipalities with power to fix, by binding contract, rates for any definite term of years. That while, as between the municipality and the public utility corporation, the ordinance constitutes a contract binding on both the municipality and the company, the paramount right of regulation of the state itself is not affected by the ordinance. That the Public Utilities Act of 1913 conferred upon the Public Utilities

Commission full power with respect to determination of rates, unfettered by any action previously taken by the municipality.

The court distinguishes cases where the state has conferred upon the municipality power to make, by ordinance, a rate-fixing contract, binding on the state itself, and the municipality has passed and the company accepted an ordinance of that character. But it would seem that even in cases of that kind it would be within the power of the state to increase, though not to decrease without the consent of the company, the ordinance rates. It would seem that the state itself, as representing the public, should have the power to waive the right of the public to insist upon the terms of the contract and to consent to a modification of those terms. Action by the state rate determining commission, if duly authorized by legislation, increasing rates at the request of the public utility company, would in effect amount to such a waiver: see *City of Englewood v. Denver St. R. Co.*, Adv. Op. Sup. Ct. U. S., L. Ed., 1918-19, p. 149. In any event it is only rarely that the courts have sustained ordinances as contracts preventing future state action with respect to rates: case last cited; *Milwaukee Electric R. & L. Co. v. Railroad Commission*, 238 U. S. 174, 180; *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 273.

It would seem that the desirable result to be reached would be the maintenance of rates at all times at such figures as would yield the company a reasonable return on its invested capital, no more and no less. Public service companies furnish services essential to the public. In the long run, those services cannot be furnished, or at any rate adequately furnished, unless the company is permitted to earn a reasonable return on its investment. It is therefore for the public interest that the companies be allowed such a return—just as much so as that the companies be not permitted to charge excessive rates. The greatly increased cost of operation brought about by the war has forced these considerations upon public attention. The result of cases so far would seem to indicate that there are no constitutional limitations upon the power of the state to increase the ordinance rates of public service corporations.

L. M. G.

QUASI-EASEMENT—IMPLICATION OF GRANT OF EASEMENT.—The case of *Sprengel v. Windmueller*, 286 Ill. 411-413; 121 N. E. 805, recalls again the situation in the Illinois law as expounded by the Supreme Court of the state, upon the question of quasi-easements. In that case a common owner of several lots had a building on one of them that overlapped the adjoining lot, also owned by him, and, thus possessed, conveyed the lot with the building upon it, the deed describing the lot according to its proper legal designation and without reference to the circumstance of the building thereon overlapping the next lot. In that condition the court considered there was an implied grant for an easement to have the building stand upon the portion of the other lot of the grantor upon the theory, to use the language of the court, that "where the owner of land divides it

and sells one part he, by implication, includes in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form they were at the time he transferred the property."

It is believed that the situation thus presented would call for such conclusion under the law as applied in any jurisdiction whatsoever, for this is an example of the implied grant which proceeds largely upon the rule that the grant is construed most strongly against the grantor and in favor of the grantee, and the presumption that the grantor intends to give all that is beneficial and convenient to the enjoyment of the grant, even though not necessary, implies an easement under circumstances where the enjoyment in fact of an easement in other property of the grantor is open and apparent. Quære, whether here it is not even necessary (ILLINOIS LAW REVIEW, III, 187).

The principal case, however, cites as some of the cases in support of the rule, the early case of *Ingals v. Plamondon*, 75 Ill. 118, and the case of *Powers v. Heffernan*, 233 Ill. 597, which were cases of implied grant back, i. e., where the common owner claims an implied easement in favor of property which he retains and in and to property conveyed away by him. It was understood to be the common law rule that such implied grant back could not occur except where, in addition to being continuous and apparent and beneficial or convenient, the enjoyment was also either a necessity or reciprocal. Indeed, as well set forth in the comment which appeared in ILLINOIS LAW REVIEW, III, 187, 188, the case of *Ingals v. Plamondon*, above referred to, would seem to be an example where such enjoyment was reciprocal, the easement claimed being a flue in a party wall, which, of course, was of reciprocal and mutual benefit to both lots.

However, the law would seem settled now, in this state, that the same rule is to be applied in determining the existence or non-existence of a quasi-easement, whether it be that of the implied grant variety, or that of the implied grant back (ILLINOIS LAW REVIEW, III, 187; IV, 430; XI, 132, 210).

E. M. L.

INTERSTATE COMMERCE—CARRIER'S CHARGES—LIABILITY OF CONSIGNOR AND CONSIGNEE AT SCHEDULE RATES: *P., C., C. & St. L. R. Co. v. Fink*, 250 U. S. 577; *N. Y. Cen. R. Co. v. P. & R. Coal & Iron Co.*, 286 Ill. 267; 121 N. E. 581.—The apparent hardship to the individual which occasionally results from the "inescapable force" of the rate schedules filed with the Interstate Commerce Commission, is illustrated by a number of decisions in actions for carriers' charges.

Early cases had to do with the liability of the shipper for the correct amount where his contract was for less (*Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98; *Tex. & P. R. Co. v. Mugg*, 202 U. S. 242; *Tex. & P. R. Co. v. Cisco Oil Mills*, 204 U. S. 499; *Kan. City R. Co. v. Albers Commission Company*, 223 U. S. 549. The schedule rates were held to govern the transaction in each case, and al-

though for a time some doubt existed as to the liability of the carrier to a collateral action by the shipper for damages incurred by reason of the misquotation of the rate, this was entirely dissipated by the Supreme Court of the United States in *Ill. Cen. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441. This leaves as the only remedy of the shipper for a misquotation of rate, that consistent with the purposes of the act and the theory of its decisions, the proceeding for a penalty payable to the United States. *N. Y. Cen. R. Co. v. P. & R. Coal & Iron Co.*, 286 Ill. 267, illustrates the unqualified liability of the shipper as the contracting party. There it was held that where the charges were to have been collected from the consignee upon delivery, but were not, and could not be afterwards, the shipper was liable, and that the fact that no notice of the failure of the consignee to pay the charges was given to the shipper until after the consignee became insolvent was not material.

The effect of the Interstate Commerce Act upon the liability of the consignee has been the subject of considerable litigation. At common law the consignee was liable, where from the circumstances, an undertaking to pay could be implied as a matter of law or as a matter of fact. Where the carrier with a lien for unpaid charges (through mistake or with the understanding that he would pay them) delivered the goods without satisfaction to the consignee who was the owner, or who knew at the time that the carrier looked to him for the charges, an undertaking of the consignee to pay was implied as a matter of law. The consignee is presumed to be the owner and so was *prima facie* liable. But, in accordance with many authorities, where the amount of the charges agreed upon was paid at the time of delivery, he would not be liable for more, and the question has frequently arisen whether the Interstate Commerce Act makes a difference in this respect. Most cases hold that it does and that the consignee is liable for the full published rate (*U. P. R. Co. v. Am. Smelting & Ref. Co.*, 202 Fed. 720, 721, 722; *Cen. of Ga. R. Co. v. Birmingham Sand & Brick Co.*, 64 So. 202, 204; *Penn. R. Co. v. Crutchfield*, 55 Pa. Superior Court 346, 347; *N. Y., N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36; *L. & N. R. Co. v. McMullan*, 59 Southern (Ala.) 683; *Cen. of Ga. R. Co. v. Eaton Lumber Co.*, 80 S. E. Rep. 725; *Cen. of Ga. R. Co. v. Willingham*, 80 S. E. 199; *Penn. R. Co. v. Titus*, 216 New York, 17).

The typical case of where the consignee is not in reality the owner of the shipment at the time of the delivery, but this is not brought to the knowledge of the carrier, and the consignee has subsequently suffered some disadvantage in his dealings with the shipper in reliance on his understanding that the amount demanded and paid at the time of delivery is the legal charge, is settled, and payment of the balance of the proper charge at the schedule rate required, in *P., C. & St. L. R. Co. v. Fink*, 250 U. S. 577. The principle of this case would dispose of the majority of disputes which may arise between carriers and consignees. In the determination of such cases as are distinguishable, it is important to consider the

policy expressed in the language of the Supreme Court of Alabama in *L. & N. R. Co. v. McMullan*, 59 So. (Ala.) 683:

" . . . the federal courts will permit no defense to an action instituted by a common carrier engaged in interstate commerce to recover of a shipper or consignee the exact amount of its lawful freight charges, provided such defense presents a possible method by which the terms of the interstate commerce law may be evaded."

It is of importance to note that by the recent Transportation Act it is made unlawful after July first for the carrier to deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Interstate Commerce Commission may from time to time prescribe to insure prompt payment and to prevent unjust discrimination.

C. B. E.

LIFE INSURANCE—NECESSITY OF INSURABLE INTEREST IN ASSIGNEE.—In *Martin v. Stubbings* (1888), 126 Ill. 387, 18 N. E. 657, it was said that "the rule seems to be that a person having insured his own life, may, by an assignment of the policy, provide for the payment of the insurance money to an assignee who has no insurable interest in his life." In that case the assignee was a creditor and actually had an insurable interest, but the question of whether a valid assignment of a life insurance policy may be made to one having no insurable interest in the life insured was squarely presented and decided by our Supreme Court in the recent case of *Hawley v. Aetna L. Ins. Co. et al.* (December 17, 1919, rehearing denied February 4, 1920), 291 Ill. 28, 125 N. E. 707, the decision being in harmony with the dictum in the *Stubbings* case.

Hawley had insured his own life for \$10,000 under a policy payable (after some changes in the beneficiary) to his estate. After paying the premium for nineteen years, at the end of which period the policy had a cash surrender value of \$2,040, he found the expense of continuing the insurance too great, and sold and assigned the policy to Crittenden for \$2,500, the latter having no insurable interest in Hawley's life. Crittenden paid the premiums for a further period of five years, until Hawley's death, and then made claim on the insurance company for the face of the policy, but before payment was made the executrix of Hawley's estate filed a bill to set aside the assignment on the ground that it was contrary to public policy and void for lack of insurable interest in the assignee. The case came to the Supreme Court on a certificate of importance and appeal from the judgment of the Appellate Court, First District, which had reversed the decree of the Circuit Court ordering the assignment set aside. In the Supreme Court the judgment of the Appellate Court was affirmed.

The opinion of the Supreme Court (Carter, J.), after commenting upon the well-settled rule that a policy taken out by one person upon the life of another in which he has no insurable inter-

est is void at its inception, referred to the rule laid down in *Bloomington Ben. Assn. v. Blue*, (1887), 120 Ill. 121, 11 N. E. 331, that one may insure his own life and designate as beneficiary another having no insurable interest therein; and it was held that there is no rule of public policy forbidding the owner of an insurance policy taken out by him in good faith on his own life to sell and assign it to any one, and that to forbid his doing so would make it necessary for him, in most cases, to surrender the policy to the company at its own figure, a situation which would itself be contrary to sound public policy.

The principle involved in the decision in the *Hawley* case is well illustrated by a careful study of the two leading cases of the United States Supreme Court, in which a similar question was presented. In *Warnock v. Davis* (1881), 104 U. S. 775, the assignment was made pursuant to a contract entered into between the assured and the assignee at the time of the issuance of the policy under which contract the latter agreed to pay all of the premiums and was to receive nine-tenths of the proceeds of the insurance. The court, in holding the assignment void, stated that "if there is any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest." In view of this statement, it was generally assumed that the United States Supreme Court was committed to the doctrine that a valid assignment of a life insurance policy cannot be made to one having no insurable interest. In 1911, however, the question was again presented in the case of *Grigsby v. Russell*, 222 U. S. 149, in which the facts were similar to those in the *Hawley* case, and it was decided, in a carefully considered opinion by Mr. Justice Holmes, that the assignment was good regardless of the lack of insurable interest in the assignee, the *Warnock* case being distinguished by the fact that in that case the transaction was not the mere assignment of a policy taken out in good faith by the assured, himself, on his own life, and later assigned, but was, in fact, an arrangement which affected and actually initiated the policy itself. This distinction seems to be justified by the fact that the record in the *Warnock* case indicates that the assignee was in effect the moving party in the transaction and should properly have been considered as the real applicant for the insurance, and by the further fact that the opinion in the *Warnock* case cited and relied upon the case of *Cammack v. Lewis* (1872), 15 Wall 643, in which a policy for \$3,000 was assigned to a creditor to whom the assured owed \$70, the difference being such as very properly to raise a question of the good faith of the assignee in his claim of the entire proceeds of the policy. It should be noted that the rule laid down in the *Grigsby* case, and in the *Hawley* case, is always subject to the condition that the person actually initiating and taking out the insurance must have the required insurable interest in the life insured, and this condition is satisfied by the interest which one has in

his own life, who, in good faith, takes out a policy thereon. (*Bloomington Ben. Assn. v. Blue*, supra; *Campbell v. Ins. Co.* (1867), 98 Mass. 381.)

The decision in the principal case is in harmony with the great majority of the state courts, although a different rule has been applied in Alabama, Kansas, Kentucky, North Carolina, Pennsylvania, and Texas.

H. C. H.

INHERITANCE TAX—TRANSFERS INTENDED TO TAKE EFFECT AT GRANTOR'S DEATH.—In *People v. Shaffer*, 291 Ill. 142, 125 N. E. 887, an inheritance tax was sustained upon a transfer of property made seven years before decedent's death, on the ground that it was "intended to take effect in possession or enjoyment at or after such death." Where this is the actual intention of the parties, as shown by the evidence, it is held that the transfer is subject to tax "notwithstanding such evidence is not in writing, but can be shown only by parol" (p. 889). Several cases are cited in support of this rule, among them *People v. Moir*, 207 Ill. 180, in which it was said (at p. 190):

"If the failure to evidence such intention in writing would defeat the inheritance tax, such tax could be defeated in every case by the parent executing a deed to his children and prospective heirs, relying upon their parol promises to account to him for the rents of the lands conveyed during the life of the grantor."

This may be a good reason for taxing such a transfer, but it is not necessarily a compelling reason for construing the statute literally, as if "intended" must refer to the donor's state of mind when making the gift. There are serious constitutional difficulties in holding that the donor's intention, regarded as a mental state, existing when the gift was made, can render a particular transfer subject to taxation.

The inheritance tax has now become so familiar that it appears as something *sui generis*, and, as it were, constitutional in its own right. It may be suspected, indeed, that it is acquiring a sort of prescriptive right to be held constitutional and is no longer vulnerable to arguments that might once have been successfully urged against it. According to *Kochersperger v. Drake*, 167 Ill. 122, payment of the tax is merely a condition that the legislature may attach to the right to take property by descent or devise, since that right is purely statutory. In other words, as the legislature might cut an heir off entirely, he can't complain because he is cut off in part. Some such theory was necessary to sustain the tax, as the progressive rates clearly violated the provision of the Illinois constitution (Article IX, sec. 1), "that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." It is sustained, in other words, not as a tax, but as a condition attached to a privilege. Now, where does a gift *inter vivos* come in on this theory? The constitutionality of the law, as applied

to a gift *inter vivos* made in "contemplation" of death was questioned in *Benton's Estate*, 234 Ill. 366. The point is discussed in the opinion at p. 370, but evaded rather than answered. It may be noted in passing that a similar difficulty does not arise in respect to the federal estate tax, because there is no similar limitation on the taxing power of Congress. Nor will there be, probably, on the Illinois legislature, if a new constitution is adopted.

In *Rosenthal v. People*, 211 Ill. 306, it was said that the purpose of the statute is to tax such gifts or transfers "as are of like nature with wills." Presumably the argument would be that if the legislature may regulate descent and devise, it may regulate any mode of settlement or disposition of property, which accomplishes the same things. Now two characteristics of testamentary disposition are: (1) that the testator can revoke or change his disposition at any time prior to his death, and (2) that he continues to enjoy the income of the property devised as long as he lives. A gift *causa mortis* would be "of like nature with a will," because revocable if the donor recovered from his then illness; a transfer to take effect in possession at the donor's death comes under (2) *supra*, because the donor continues in enjoyment as long as he lives. The *actual continuing in enjoyment* by the donor of property belonging to the donee (and not the donor's intention) is what the legislature has power to regulate, and consequently what gives the right to tax such a transfer. Or, looked at from a different angle, intention implies a reference to the future. A man intends what he desires and is endeavoring to bring about. This desire and effort has reference to the balance of the donor's life. But after his death his intention has either been carried out or failed. Why should the court infer his intention from what was done, when the real basis of taxation are the very facts directly proved in evidence which are the expression and consummation of the intention? The statute seems to make intention the criterion of taxability; but this cannot be taken literally without making the tax unconstitutional. "Intention," as used in this statute, must be regarded as something conclusively proved by the subsequent events, and totally unrelated to the donor's thoughts or hopes while making his gift. This view finds support in the language of *People v. Mow*, *supra* (quoted with approval at p. 889 of the opinion under discussion),

"if the actual possession and enjoyment are retained by the grantor until his death, and the grantee exercises no right of ownership or does not take possession or come into the enjoyment of the land when the deeds are executed, their conduct should estop them from asserting that their intention was otherwise."

The retention of possession and enjoyment, in the instant case, was clearly proved, and the court's decision might well have been rested entirely on such conduct of the parties—either directly, as being what the statute meant by "intended to take effect in possession or enjoyment at or after such death," or as estopping them from asserting that their intention was otherwise—instead of upon

the more doubtful and less logical ground of intention regarded as a mental purpose. C. B.

LEGISLATIVE, JUDICIAL, AND EXECUTIVE POWERS—THEIR DISTINCTION—DELEGATION OF POWERS.—In *Mitchell v. Lowden*, 288 Ill. 327, 123 N. E. 567, the court holds that the act of 1917 authorizing the construction of a state-wide system of hard roads under the supervision of the Department of Public Works does not delegate either legislative or judicial power to that department, and that the act does not violate Article III of the state constitution.

I. Various other constitutional objections were advanced against the validity of the act, but restricting the discussion to the points mentioned above, it will be observed that the question involved is one of formal jurisprudence which occasionally intrudes itself on the domain of practical affairs, and it may be interesting to compare the jurisprudential and the practical solutions. The court here adopts definitions previously formulated.

"Legislative power," says the court, "is the power to enact laws or declare what the law shall be (*People v. Roth*, 249 Ill. 532). Judicial power is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law (*Owners of Lands v. People*, 113 Ill. 296)."

The difficulty of carrying out a theoretical separation of powers is now universally recognized. (See Gray, "Nature and Sources of Law," p. 97; Korkunov, "General Theory of Law" (Hastings' trans.), p. 377; Cohen, "The Process of Judicial Legislation," Am. L. Rev. (1914), XLVIII, 161; Cooley, "Torts," p. *375; *People v. Roth*, 249 Ill. 532 (535); *Brown v. Turner*, 70 N. C. 93 (102); *State v. Public Ser. Com.* (Wash.), 162 Pac. 523.) An illustration given by Cooley ("Torts," p. *375) is very appropriate:

"The officers chosen to levy and apportion taxes for the inferior municipal subdivisions of the state are, in some cases, authorized—

First—To determine what taxes shall be levied. . . .

Second—To value the property. . . .

Third—To apportion the taxes . . . ; and

Fourth—To receive from their superior officers the statements of taxes to be assessed for more general purposes, and to apportion these in the same way."

The author then proceeds to say:

The first of these duties partakes of the legislative, the second of the judicial, the third and fourth of the executive, but, in strictness, none of them can be classed as belonging specially to either department of the government, and the officers who perform them are usually designated 'Administrative Officers.'"

But what are legislative, judicial, and executive powers? Hundreds of definitions are embalmed in the reported cases, but we need not go far afield to discover that considerable difficulty is met in applying the usual type of definition, tested by logical standards.

For example, let us consider the definition of legislative power found in *People v. Roth* (249 Ill. 532 (535))—

"Legislative power is the power to enact laws or declare what the law shall be. It is the power to enact new rules for the regulation of future conduct, rights, and controversies."

The term *enact* does not here appear to have a technical meaning, since it is used, as it would seem, as a synonym for *declare*. If the definition had said that legislation is *enacted* law (technical sense), an entirely different question would be presented, since in that case the test of what is legislation would be determined by the *official character* of the agency of the sovereign from which the rule proceeds.

Two objections may be quickly instanced as the definition stands. First, what of retrospective laws?¹ Even Austin had difficulty with this particular category, since if law is the *command* of a political superior to an inferior, it is illogical to suppose that a command can govern the will of a person concerning his past conduct. Austin's escape from the dilemma was to regard retrospective laws as commands not to private persons, but to officers of the state. In the field of penal law, where acts which were lawful when done became unlawful by *ex post facto* declaration, this is the only exit. But in the field of remedial law, no such exit is necessary. Where the effect of past conduct is changed (constitutional objections apart), as where, for example, a harm done to another is without remedy, and later a remedy is given, the definition may be squared with the legal fact; for here *future* conduct is regulated and *new* rights are created. Thus, there may be specific enforcement of that which, on the facts before legislative declaration, could not be enforced, or a remedy of reparation may be given for what theretofore was remediless.

The second objection is that not only do legislatures "declare what the law shall be," but the courts also do this. It is a commonplace to remark that if the courts had not created rules of law we would not today have a Common Law. It is true, of course, that the rules of law declared by courts do not operate in general only prospectively—they extend to past situations of fact equally with future situations of fact. But this dual operation of precedent is not one of the essentials, but only an accidental quality, of precedent. Precedent could be limited to prospective operation, and it would still be the declaration of a rule of law. There might be a vested interest in overruled cases. (See Va. Law Rev., IV, 103, 104, notes.) The retrospective operation of precedent is historically connected with the declaratory theory which prevails in Anglo-America, according to which, precedent does not *make* law, but only *declares* what the law is; or, as otherwise stated, precedent is only evidence of what the law is.² If a case is overruled, in legal theory

1. E. g., Fox's Libel Act, which declared that juries were judges of the law in prosecutions for libel: *Cooley*, "Const. Lims."§ 112.

2. *Gray*, "Nature and Sources of the Law," cap. ix.

it never was law.³ It amounts to no more than adjudication of a particular controversy. Other concrete, unadjusted and contemporaneous legal conflicts are unaffected by the overruled case, but will, in general, be governed by the overruling case. The overruling case may itself, as sometimes happens, be swept away by another overruling case, and the process might be repeated, theoretically, *ad infinitum*.

It thus appears that Anglo-American law, according to the dominant theory, has a certain mysterious, if not a metaphysical, character. We can never reach the thing itself, and we can never attain apodictic certainty of the evidence.

This theory is wholly unsatisfactory. In this realistic age the whole theory of precedent should be overhauled. A new theory should be constructed which conforms to the facts. The premises of this reconstruction involve: (1) Official and theoretical recognition of what every person in the world knows, that courts must and do make, alter, and abrogate rules for human conduct within the scope of litigation; (2) recognition for certain purposes of vested interests in judicial declarations of law, and (3) limitations on the obstructive function of *stare decisis*.

One of the most authoritative judicial attempts to distinguish between precedent and legislation is a case dealing with the powers of the Virginia State Corporation Commission (*Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210). The commission (which was created by the Virginia constitution) had power to prescribe rates, charges, classification of traffic, and rules and regulations, etc. Before prescribing any rate or charge, etc., the commission was required to give notice and to hear objections and evidence. The commission also had power to enforce compliance with its order by its own process, by adjudging fines and penalties established by law. As to the character of these powers, the court, speaking through Mr. Justice Holmes, says:

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature [the court had already assumed that some of the powers were judicial], and none the less so that they have taken place within a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by sec. 720 [U. S. Rev. St.]. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.⁴ The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. . . .

"Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats., sec. 720, no matter what may be the general or dominant character of the body in which they may take

3. *Salmond*, "Jurisprudence,"³ 366.

4. Cf. *Southwestern Coal Co. v. McBride*, 184 U. S. 499.

place. . . . That question depends not upon the character of the body but upon the character of the proceedings. . . . ”

Noteworthy as is this definition in the reflected light of the well-deserved fame of its author as a jurist, we are temerarious enough to believe that it fails in clearness of distinction. If this should be true, it may at once be said by way of extenuation that the tools of the judge, even though he happen to be a jurist, need to be no sharper than the legal operation in hand calls for. From that point of view the definition is satisfactory and very happily framed. But it leans rather too heavily on the ancient declaratory fiction to be useful in jurisprudence, even with the qualification “under laws *supposed* already to exist.” For the purposes of the science of law that qualification is irrelevant. If a new rule is made, it is legislation, even though it occurs with the exercise of the judicial function. Formally, and, perhaps, captiously, it may also be objected, that a judicial inquiry does not enforce a liability, but only directs enforcement by the executive. And, again, a judicial inquiry may do more than deal merely with liabilities—it may adjudicate claims against the state, it may declare rights, it may direct the enforcement of rights by way of specific relief, it may invest and divest rights, and it may supervise the administration of estates.

II. In a constructive consideration of the problem, we may begin with legislation. In the strict, modern, technical sense, *legislation is the declaration, independently of their application, of new rules of compulsory conduct, by an organ of the state, whose powers are specialized to exclude other functions except as incidental.*

The purpose of the definition just ventured is to reconcile the pure concept of legislation as given by the science of law with the political facts of modern life. Jurisprudentially, the creation, alteration, or abrogation of a rule of law is legislation, no matter how, where, or by whom. It may be by a ‘legislature,’ by a ‘court’ in deciding a case of first impression, or by the people directly, in the development of customary law. It may also, in the sense of jurisprudence, include executive, municipal, and autonomous rule-making, the rule-making of courts in procedural matters, and the rule-making of commissions, boards, and other administrative bodies and officers. In this sense, the statement in the opinion quoted, of the Supreme Court of the United States, is correct—“proceedings *legislative in nature* are not proceedings in a court . . . no matter what may be the general or dominant character of the body in which they may take place.”

It may also be noticed that legislative bodies exercise other functions than those defined as legislative in a strict sense (e. g., trial of impeachment), and that a legislative body may make formal declarations which in no way involve compulsory conduct (e. g., resolution of the state legislature urging representatives in Congress to repeal a daylight saving law). Moreover, there are various other types of legislative enactment which in appearance do not formally come within the definition; thus pension bills may be enacted, courts

may be organized, the territory of the state may be divided for various purposes, fees and salaries may be fixed, appropriations may be made, new offices may be created, appointments to office may be made, weights and measures may be established, acts already performed may be validated. But in all these cases (except, perhaps, the executive function of appointment to office) the substance of the thing done is to prescribe conduct of public or private persons, either mediately or immediately. The conduct regulated is that either of private persons or of public persons. It is very rare, even in criminal statutes, in the modern age, to find statutes clothed in the strict, imperative form of the Twelve Tables or of the Dooms of Æthelbirht. The grammatical form adopted is that of the conditional mood—“if two or more persons conspire, etc. . . . they shall be liable.” The emphasis is rather upon the *power* of the public officer in criminal statutes than upon the *duties* of the citizen.

The considerable diversity of form of legislative enactments has led to various attempts at classification.⁵ For our present purpose it is sufficient to classify legislative norms as administrative (which relate to the militia, administration of justice, general welfare, fiscal operations, and other sovereign interests) and (for want of a better term) non-administrative (which cast duties upon private persons). These duties of public persons and private persons, respectively, are incident to private, social, and state interests. (The distinction of public law and private law is not now under consideration.)

Diagrammatically, therefore, norms may be represented as follows:

	Duties of Public Persons to	Corresponding to	Duties of Private Persons to	
Administrative Norms	{ Private Persons Social Groups The State	Private Interests Social Interests State Interests	{ Private Persons Social Groups The State	Non-admini- strative Norms

III. How then shall we define the judicial and the executive functions, to distinguish them from the legislative functions? It is of the essence of the *judicial* function, in a modern sense, to determine a specific controversy, by the application of a rule of compulsory conduct—at least it amounts to that, in the last analysis.

But the judicial inquiry function may also involve the stating of legal rules. A judicial pronouncement of legal rules may be either original—the creation of a precedent; or it may be only declaratory—the reassertion of a rule of law previously declared either legislatively or judicially. In defining a ‘court’ the same qualification must be employed as in the definition of legislation; it is an organ of the state whose powers are specialized to exclude other functions than those of judicial determination by inquiry *except as incidental*. The chief incidental function of a court is

5. The varieties of these classifications are noted and discussed by *Del Vecchio*, “Formal Bases of Law” (Modern Legal Philosophy Series, Vol. X), pp. 169 seq. Following are some of the leading types: *Cicero*: iubere, vetare; *Modestinus*: iubere, vetare, permittere, punire; *Thöl*: positive, negative, explicative.

legislation in the direct sense, as, for example, in the making of rules of procedure. Courts legislate in the jurisprudential (or indirect) sense, in the creation, alteration, or abrogation of compulsory rules of conduct, exclusive of procedure, but never apart from the actual determination of a concrete legal dispute properly submitted.⁶

IV. *Executive* function is the factual and ultimate realization of a rule of compulsory conduct through an organ of the state. It may or may not include power of appointment to office. The qualification found necessary as to legislation and judicial power (as to excluding other functions except where incidental) does not seem to be required in this instance, since the larger part of the highest executive power may be, and, in practice, is, delegated to inferior executive officers and to officers called 'administrative' officers, whose functions are normally plural—judicial, legislative, executive.

It needs to be noticed that while legislative, judicial, and executive powers lie in fields which may be differentiated both theoretically and practically, *administrative* power is really a fourth term; its function in pure theory must always be one of the three kinds of powers enumerated, but in practice it may be and usually is a combination of two or more of these powers.⁷ Clear examples of this combination of powers are the Interstate Commerce Commission, the Federal Trade Board, and the numerous state public utility commissions.

It is difficult to identify the chief executive of the constitutional state as executive officers at all. In the Illinois constitution of 1818, the executive had little power. The General Assembly had wide appointive power—a purely executive function. (See Constitutional Convention, Bull. No. 9, p. 632. Leg. Ref. Bur. (Ill.)). The appointive power may, perhaps, fall in another group as in the classification made by Professor Willoughby ("Introduction to the Study of the Government of Modern States," N. Y., 1919), who divides the departments of government into legislative, judicial, executive, administrative, and electoral. In the Illinois constitution of 1870 it is provided that "the supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed" (Art. V, sec. 6), but his actual powers are more allied to legislation than to the factual realization of legal rules. He is charged with the duty of sending messages to the General Assembly; he may convene and adjourn the legislature; he may appoint and remove officers and fill vacancies in office; he may approve or veto legislation; he may grant reprieves and pardons; and, lastly, as commander-in-chief of the militia, he may call it out to execute the laws, to suppress insurrection, or to repel invasion. At only

6. Except in the case of so-called advisory opinions: C. J., XII, 883 (sec. 386). The declaratory judgment procedure is probably not an exception: cf. *Borchard*, "The Declaratory Judgment," Yale L. Jour. (1918), XXVIII, 1, 105.

7. The term "administrative" power is criticized, and, it seems to us justly, so far as it may be supposed to be inherently different from the other powers, in *Harmon v. State*, 66 O. St. 249, 64 N. E. 117.

one point does the power of the governor actually touch the execution of law, and at that point the function of the governor probably amounts to no more than mere prevention of interference, rarely to be expected, with the powers of executive officers of county or city government. There is no hierarchical connection between the governor and a sheriff, and the governor's relation to a judicial mandate to a sheriff who is commanded to hang a prisoner goes no further than to preventing interference with the sheriff by a mob in the discharge of the sheriff's duty. The chief executive officer, therefore, in American government is essentially the chief legislative officer of the state, and so far as his powers otherwise touch the juridical establishment, he is either a judicial officer (as, for example, when acting on a requisition for extradition), or he is the representative of what lies beyond the scope of law, except for constitutional purposes, the sovereign interest of military power.

In France, to illustrate another method of distribution of powers, the judiciary is not a constitutional establishment, but is a branch of the executive department. (See Garner, "The French Judiciary," Yale L. Jour. (1917), XXVI, 349.)

V. Before any generalization is attempted as to how the question of what is legislative, judicial, and executive power, is resolved, a rapid survey of some of the typical Illinois cases will be advisable.

(a) The constitution is only a *limitation* of the powers of the legislative,⁸ but it is a *grant* of judicial and executive power: *Field v. People*, 3 Ill. 79; *Sawyer v. City of Alton*, 4 Ill. 127; *Burritt v. Commissioners*, 120, Ill. 322; *Harder's Van Co. v. Chicago*, 235 Ill. 58; *People v. Nellis*, 249 Ill. 12; *Neiberger v. McCullough*, 253 Ill. 312; *Sutton v. Gas Co.*, 284 Ill. 634 (640).

(b) The legislature may enact rules of evidence (*Burbank v. People*, 90 Ill. 554; *Waugh v. Glos*, 246 Ill. 604; but it cannot declare what shall be conclusive evidence, *People v. Rose*, 207 Ill. 352), or of court procedure (*Honore v. Home Bank*, 80 Ill. 489). It may authorize a court to fill vacancies in office (*People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 116 Ill. 587); but it cannot give a court power to change boundaries (*Galesburg v. Hawkinson*, 75 Ill. 152). It may confer so-called quasi judicial powers on non-judicial officers (*People v. Simon*, 176 Ill. 165; *People v. Kipley*, 171 Ill. 44); but it cannot invest a court with appellate jurisdiction over the orders of a board of fire and police commissioners (*Aurora v. Schoeberlein*, 230 Ill. 496). It may delegate to a city council power to regulate the charges of a common carrier (*Chicago Traction Co. v. Chicago*, 199 Ill. 384).

(c) A trial of right of property before the sheriff is not a judicial proceeding (*Rowe v. Bowen*, 28 Ill. 116, but see the dissenting opinion of Caton, C. J.); a clerk of court cannot be invested with power to render judgment by default (*Hall v. Marks*, 34 Ill. 358); power to remove an officer for cause after hearing is not

8. When the legislative power is undefined, it includes judicial and executive functions: *Martin v. Hunter*, 1 Wheat. 304.

judicial in character (*Aurora v. Schoeberlein*, 230 Ill. 496); the Parole Act does not vest judicial powers in the Board of Pardons (*People v. Joyce*, 246 Ill. 124); a coroner does not hold judicial power (*Palenske v. Bruning*, 98 Ill. App. 644), nor does a Board of Review (*Maxwell v. People*, 189 Ill. 546); judicial power cannot be exercised by a person not a judge, even with the consent of the parties and the presiding judge (*Bishop v. Nelson*, 83 Ill. 601); power of a board of health to revoke a license to practice medicine is not judicial but ministerial (*People v. Apfelbaum*, 251 Ill. 18).

VI. The question of the distinction among the powers of government may arise in two ways: (a) Where one branch of the government is exercising a power which by the constitution belongs to another branch; (b) where a branch of the government attempts a delegation of its power. The question arises more often in the second way, under the general rule that legislative and judicial powers may not be delegated.

On the question of *delegation*, as was said in *People v. Roth* (249 Ill. 532, 535)—

"The government of a state is not such an exact science that every possible contingency can be foreseen and provided for by legislative enactment."

Much, therefore, must be left to so-called administrative officers, but the test of what may be delegated often is applied with difficulty.

One of the clearest expressions of the test itself is found in *United States v. Grimaud* (220 U. S. 506), where the question was whether Congress could confer power on the Secretary of Agriculture to establish rules under forest reservation acts. The defendant was indicted for grazing sheep on a federal forest preserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. It is said that when Congress has indicated its will, it may delegate to those who are to act "under such general provisions, 'power to fill up the details' by the establishment of administrative rules." Thus, as the court says, in the last case, the Interstate Commerce Commission may make reasonable rates and administer the law against discrimination (*Int. Com. Com. v. Ill. Cent. R. Co.*, 215 U. S. 452) under a law making it unlawful to charge unreasonable rates or to discriminate between shippers. Again, where Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, the commission was empowered constitutionally to fix a uniform standard. Reference is also made to the statutes concerning obstruction of navigable streams, sale of oleomargarine, and importation of teas, where executive officers were authorized to make rules and regulations.

The court proceeds to say—

"A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which

the act itself had affirmatively required to be done, or treated as unlawful if done."

Within constitutional limits the *discretion* of the legislature is absolute, but this discretion can never be transmitted without limitation. The legislative delegation must at least to some extent be made tangible. There are formally various ways in which this may be accomplished; for example, teleologically, by pointing out the object to be attained, leaving to administrative officers the choice of means of attaining it. The *Grimaud* case seems to be an illustration of this method. Another way is to point out the ultimate legislative direction with either a specification of alternatives, or of limitations. It is not sufficient, however, that one of these methods be employed; it is further necessary that the *discretion delegated be reasonable* in the light of what was legislatively possible and desirable, to restrain it within bounds. It is this element which makes the application difficult and accounts for the great diversity in the decisions which has been remarked even by the courts themselves. A few illustrations will show the range of application of the test suggested.

In *Kenyon v. Moore* (287 Ill. 233) the discretion given to county superintendent of schools to establish high schools on petition was too wide; it lacked limitation, and therefore was unreasonable because it was legislatively possible in the circumstances to indicate the policy of the act so that action would not rest on the mere caprice of an administrative officer. The governor was authorized to settle the accounts of a railway company for revenue due to the state. This was not regarded a delegation of judicial power (*State v. Ill. Cent. R. Co.*, 240 Ill. 230). The Parole Board is properly empowered to formulate rules; this is not an illegal delegation of legislative power (*People v. Roth*, 249 Ill. 532). A county judge may be empowered to appoint members of a mine examining board (*People v. Evans*, 247 Ill. 547). The character of a grade crossing may be determined by the Public Utilities Commission; this is not an illegal delegation of legislative power (*Chicago, etc., R. Co. v. Lake County*, 287 Ill. 337). The Workmen's Compensation Act does not offend as a delegation of judicial power to arbitrators (*Johnson v. Choate*, 284 Ill. 214).

We believe that by the test proposed these cases are harmonized. The whole question is one of curial fact which is gradually being developed into a body, if not of legal doctrine, at least of negative judicial limitations comparable to the growth of negligence law in the field of directed verdicts.

VII. At this point, and, in conclusion, some general propositions may be ventured:

1. The legislative power is the preponderant one in the state, in the *range* of its activities, while the judicial power is preponderant in *penetration*. Formally, the legislative power may in American government cover the entire field of state activity except as the constitution requires a separation of powers. The judicial power is the outgrowth of legislative power, and in the case of unconsti-

tutional legislation, the child slays its mother. Historically, of course, it is otherwise; since the judicial power in the rudimentary state appeared long before the exercise of legislative power in the modern sense of enacting general rules of human conduct.

2. In the American constitutional state the *legislative* power may be *delegated more widely* and effectively than judicial power. A law may be made contingently operative, at least in local matters, upon the action even of private persons (*Guild v. City of Chicago*, 82 Ill. 472) or determined by the result of an election. Judicial power does not submit of similar contingent operation. This results in part from the fact that a constitution is a limitation of legislative power, while it is only a grant of judicial power. Consequently, as a mechanical social fact, the pressure of new needs expresses itself readily in the creation of boards and commissions which take up the strain on legislation, and in part also of the increased demands on the courts. The judicial power finds no direct outlet for increased burdens except through the multiplication of courts. Cf. "Delegation to the Judiciary of Non-Judicial Powers," Va. L. Rev. (1920), VI, 441.

3. The question of delegation rarely comes in question with respect to the *executive* power, since it chiefly involves acts of a so-called ministerial nature (not requiring the exercise of discretion in the legal sense), which may be performed by any person officially employed or appointed by the chief executive officer. Thus a sheriff may make a levy of execution by a deputy. Except as the state constitution provides to the contrary, an executive officer may also be a judicial officer. Thus, in Indiana, mayors of cities exercise judicial powers;⁹ but such power cannot be conferred in Illinois (*People v. Maynard*, 14 Ill. 419; *Beesman v. Peoria*, 16 Ill. 484).

4. A power delegated cannot be *redelegated*: *delegatus non potest delegare*: (*Carbondale v. Wade*, 106 Ill. App. 654). This applies strictly to the judicial power, but not to the legislative power so far as concerns local government.

5. *Judicial* power (i. e., adjudication of rights, duties, powers, and liabilities) over private persons cannot be conferred on *agencies not courts*. In Illinois the decision of a case cannot be delegated to a private attorney. In Indiana¹⁰ and other states, the trial judge may appoint an attorney as acting judge. The suggestion has been made for the establishment of similar delegation in Illinois. A constitutional provision would probably be necessary to effectuate it. Whether a clerk of court may be authorized to issue warrants is answered both ways in the courts of the various states. Entry of judgment on a referee's report or of a confession of judgment may be made by a clerk of court (*Conkling v. Ridgeley*, 112 Ill. 36). Whether a clerk of court may enter a default judgment is also answered both ways (*Hall v. Marks*, 34 Ill. 358, gives a negative answer).

9. Burns' Ann. Stats. (1914), § 840.

10. Id., §§ 427-431, 1660-1663.

6. Judicial power (i. e., adjudication of rights, duties, powers, and liabilities) over public persons may be delegated (e. g., to civil service commissions).

7. Power delegated to a *board* or commission has a more favorable presumption of legality than similar delegation to an individual. The basis of this distinction goes back to Montesquieu.

8. Administrative officers, while theoretically either legislative, judicial, or executive officers, are, for the purposes of constitutional law, *sui generis*.

9. Legislative, judicial, and executive powers are confused in all the departments and activities of government, but the lines are more sharply drawn in the general and superior departments than in the local and inferior departments. (Cf. Green, "Separation of Governmental Powers," Ill. L. Bull., II, 417: Yale L. Jour. XXIX, 369.)

10. A stricter rule is applied where the rights of private persons *inter sese* are in question than where the rights of public officers, of persons with public or quasi public callings, or of persons (or property) in the custody of the law, are involved.

A. K.

RECENT CASES

[Contributed by the Undergraduate Board]

DEEDS—DEED IN CONSIDERATION OF PROMISE TO SUPPORT WILL BE SET ASIDE ONLY WHEN SECURED WITH FRAUDULENT INTENT: *Detienne v. Detienne*, 291 Ill. 439, 126 N. E. 153.—In 1894 appellant, as an heir of her father, became the owner of 46 acres of land, and in 1895 she conveyed by deed the west half of this tract of land to her husband, who is appellee. In 1919 appellant filed a bill, alleging that the conveyance was made in consideration that her husband would properly support and care for her, and asked that the deed be set aside on the ground that her husband had violated his agreement by adopting a course of cruel treatment toward her. The trial court decreed that the bill be dismissed for want of equity, and further, that, as the property conveyed was a homestead, appellee acquired title to the premises in excess of the homestead interest of \$1,000.

Appellant and appellee had lived together for 37 years and there was no evidence that they would not continue to so live. During the last few years of their married life the husband had become addicted to the use of liquor, and at times, for a space of a few days, would neglect his family and home. Also at times he was cruel to appellant and family quarrels were numerous. The question presented was whether this testimony would justify the setting aside of the deed.

The settled rule in Illinois seems to be that where a grantor conveys land and the consideration is an agreement by the grantee to support and care for the grantor, and the grantee neglects or refuses to comply with the contract, the grantor may in equity have a decree rescinding the contract and setting aside the deed. But the theory of the cases seems to be that equity intervenes because the neglect or refusal of the grantee to comply raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception: *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673; *Hursen v. Hursen*, 212 Ill. 377, 72 N. E. 391; *Fischer v. Fischer*, 245 Ill. 426, 92 N. E. 283. A deed such as the one in question can be set aside only when such facts are shown as will warrant the presumption that the contract was entered into and the deed secured with the fraudulent intent not to perform the conditions of the contract. *Wood v. Leeka*, 262 Ill. 607, 104 N. E. 1048; *Chamberlain v. Sanders*, 268 Ill. 41, 108 N. E. 666. Mere vexation and annoyance of the grantor caused by quarreling in the family at a time long after the deed was executed is not ground for setting aside the deed: *Hagan v. Waldo*, 168 Ill. 646, 48 N. E. 89.

There was no showing of fraud in this case in obtaining the deed or that appellee at that time entertained any thought of adopting a course of ill-treatment toward his wife.

As to the question concerning the homestead, a deed by a wife to the husband in which the husband does not join is void where the homestead property is not worth over \$1,000: *Roberson v. Tippie*, 209 Ill. 38, 70 N. E. 584. Here the property was worth considerably more than \$1,000 and the court held that the lower court was right when it decreed that part of the premises in excess of \$1,000 to the appellee, but to the extent of \$1,000 in value the title in the premises were unaffected by the deed: *Barrowes v. Barrowes*, 138 Ill. 649, 28 N. E. 983; *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227; *Heckman v. Detloff*, 283 Ill. 505, 119 N. E. 639.

MUNICIPAL CORPORATIONS—CITY TRAFFIC REGULATION OF MOTOR VEHICLES NOT CONFLICTING WITH STATUTES: *City of Chicago v. Keogh*, 291 Ill. 188, 125 N. E. 881.—Keogh was arrested on a complaint charging that he was driving a motor vehicle in the City of Chicago and that he overtook and passed a street-car by turning to the left into the car track for use by street-cars and vehicles moving in the opposite direction, in violation of section 2493 of the Revised Municipal Code of the City of Chicago.

It seems Keogh overtook a street car going in the same direction and turned his automobile to the left and passed the street car on that side while it was moving. The facts were not in dispute. Keogh contended that the above section of the municipal code was invalid because it is in conflict with the Motor Vehicle Act (Hurd's Rev. St., 1917); that it is an unreasonable limitation on the right to use the streets; that it unlawfully discriminates against drivers of motor vehicles, and is in violation of Art. 4 of the state constitution. In the municipal court, Keogh was fined \$5 and costs, and the court certified that the validity of a municipal ordinance was involved, and that public interest required it to be passed upon by the Supreme Court.

Section 2493 of the municipal code, the section in question, provides:

"All vehicles shall keep as close to the right-hand curb as safety and prudence shall permit, except when overtaking and passing another vehicle and except when running within the car tracks, as provided in Section 2487. An overtaken vehicle must at all times be passed on its left side, except in the case of motor vehicles and motor-cycles passing street cars or other vehicles when running within the car tracks. In such case such motor vehicle or motorcycle shall not turn to the left into the track reserved for street cars and vehicles moving in the opposite direction, but shall pass to the right of such car or vehicle so overtaken."

Counsel for appellant contended that section 12 of the Motor Vehicle Act undertakes to regulate the use, operation and speed of motor vehicles in the State of Illinois, and this deprives the local municipal authorities of the power to pass ordinances upon these subjects, and the cases of *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073, and *People v. Sargent*, 254 Ill. 514, 98 N. E. 959, were cited as sustaining that position.

The Supreme Court distinguished the above two cases from the principal case, showing that they were decided under statutes

dissimilar to the present one. The *Ayres* case, *supra*, was decided under the act of 1907. That act contained a provision, among others, that no city should have the power to make any ordinance limiting or restricting the "use or speed of motor vehicles," and under that act it was uniformly held that its purpose was to take the place of all municipal ordinances regulating the operation of motor vehicles. The *Sargent* case, *supra*, was decided under the Act of 1911, which contained the same provision as the act of 1907, with an additional provision that it was not to affect the power of a city to make and enforce traffic regulations "except as to rate of speed" not inconsistent with other provisions of the act. For a comparison of these two cases, see *City of Chicago v. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588.

The Motor Vehicle Act of 1917, under which the principal case was decided, provided that no ordinance should be passed by a municipality limiting or restricting "the speed" of motor vehicles. The Supreme Court pointed out that the words "use or" preceding the word "speed" are not in the present act. There is also a provision that the power of municipal corporations to make and enforce reasonable traffic and other regulations, "except as to rates of speed" not inconsistent with the provisions of the act, is unaffected.

It was also contended that the ordinance in question was in violation of section 16 of the Motor Vehicle Act. That section provides that an operator of a motor vehicle overtaking any horse or vehicle shall pass on the left side and the driver of the horse or other overtaken vehicle shall, on signal, turn to the right so as to allow free passage. The Supreme Court held that it was obvious that section 16 was intended to apply to country roads or streets where there were no street cars and that a street car could not be considered as a "vehicle" within the meaning of section 16.

The other objections were considered to be without merit by the court, and the municipal ordinance was held to be a reasonable one and not in conflict with the Motor Vehicle Act.

APPEAL AND ERROR—DECREE MUST FIND SPECIFIC FACTS WHERE EVIDENCE HAS NOT BEEN PRESERVED: *Hilenski v. Beman*, 291 Ill. 543, 126 N. E. 183. This was an appeal to the Supreme Court from a decree of the circuit court of Cook County ordering that appellants specifically perform a contract entered into between them and appellee for the conveyance of certain real estate. Appellants in their answer admitted ownership of the property, but denied all the other allegations and alleged facts which, if sustained, would be a complete defense to the suit. In the Supreme Court the appellee filed no brief and made no effort to sustain the decree in his favor in the court below. The testimony which was heard in the lower court in open court was not preserved in the record by certificate of evidence or otherwise, neither did the decree set out the specific facts upon which it was based.

Justice Thompson, in delivering the opinion of the court, remarked that it has long been the settled rule in this state that in

chancery cases a party in whose favor a decree granting affirmative relief is entered, in order to maintain it, must preserve the evidence by a certificate of evidence, or the decree must find specific facts that were proved on the hearing and state them: *Grays Lake and Warren M. E. Church v. Metcalf*, 245 Ill. 54, 91 N. E. 664; *Leuer v. Kunz*, 260 Ill. 584; *Van Meter v. Malchef*, 276 Ill. 451.

PARTNERSHIP—PARTNERSHIP REALTY HELD FOR PURPOSE OF SALE REGARDED IN EQUITY AS PERSONALTY: *Parish v. Bainum*, 291 Ill. 374, 126 N. E. 129.—Complainant, Parish, filed a bill in circuit court alleging that he and defendants were partners, and praying for a dissolution and an accounting. The circuit court entered a decree dismissing the bill, and an appeal was taken to the appellate court, where the decree was reversed. The cause was again heard in the circuit court, and this time the relief asked by the bill was granted. From that decree an appeal was prosecuted direct to the Supreme Court on the theory that a freehold was involved.

It seems that Parish entered into an agreement with Noah C. and Charles A. Bainum and J. S. Sweeney, wherein it was agreed to purchase certain real estate consisting of 30 acres; that Parish was to furnish the money and take a promissory note from the others for their part of the purchase money. It was further agreed that the land, when purchased, should be surveyed and platted into lots and the lots offered for sale as a subdivision of Mt. Carmel. The pleadings did not, within the meaning of the statute and constitution, put in issue a freehold. The issues made by the pleadings were whether a partnership existed and whether the complainant was entitled to an accounting of the partnership assets. The Supreme Court held that although part of the assets were lots, realty, yet when a partnership is formed for the purpose of buying real estate, not to hold permanently, but to sell for a profit, as between the partners, it is in equity regarded and administered as personal property. It is treated as assets and stock in trade of the partnership: *Van Housen v. Copeland*, 180 Ill. 74; *Speyer v. Despardine*, 144 Ill. 641. The court pointed out that the bill of Parish was predicated upon the claim that the purchase of the land, platting it into lots, and the selling of the lots was a partnership enterprise in which the complainant, as a partner, was entitled to an accounting and that the bill did not pray that the complainant be decreed to have an interest in the real estate and that the defendants be ordered to convey it to him. Thus, if Parish established his rights by proof, it did not result that one party gained and the defendants lost a freehold, because in equity, as between the partners, the unsold lots were to be regarded and administered as personal property. They were assets of the partnership and the right of the complainant to an interest in them was of the same character as his right to an interest in the other assets of the partnership and considered and treated as personalty, to be disposed of and distributed among the partners. The appeal should not have come direct to the Supreme Court, but should have been taken to the appellate court.

DIVERSITIES DE LA LEY

MOVING-PICTURES IN EVIDENCE.—Some ten years ago, in these pages (*ILLINOIS LAW REVIEW*, III, 399), in refuting the late Professor Muensterberg's reproaches to the legal profession for failing to use modern psychological methods of valuing testimony, I made the defensive assertion that "judges have sanctioned the use of every variety of scientific instrument, as soon only as it was invented, tested, professionally approved, and offered in court—including the telegraph in its various forms, the telephone, the stethoscope, the radiograph, the phonograph, and a multitude of apparatus, chemical, medical, and mechanical."

So here comes the Moving-Picture, asking to be admitted in evidence. On what conditions is it admissible?

As a concise way of expressing my view, I will here frame a passage which would serve as a new section, § 795a, of my Treatise on Evidence. The principle of using the moving-picture assumes that we have in mind the general and fundamental principles applicable to photographs (of which the moving-picture is a species), and the question is whether any special discrimination here applies, in discrimination from those general principles. The general principles may be thus summed up (§§ 790-793 of the above Treatise):

(a) A photograph is somebody's testimony; hence on the one hand it can be received only when verified by a witness competent to speak to the facts represented, and, on the other hand, the maker is immaterial, provided a competent witness verifies the photograph.

(b) If the fact represented in the photograph is not material or not relevant, the photograph of it is not admissible; e. g., a photograph of a place as it existed at a different time from that in issue and under different conditions.

(c) The possibility of a photograph being so executed (e. g., by re-touching or by supra-position of plates) as to falsify, is of itself no objection to admissibility, any more than is the possibility of an oral witness so twisting his tongue as to lie about what he saw.

Having these fundamentals in mind, the following is offered as embodying all that the law of Evidence need lay down, in special discrimination about moving-pictures:

"§ 795a. *Photographs of Artificial Settings; Moving-Pictures.* Conceding the verisimilitude of any particular photograph's reproduction of the object photographed, there remains always the assumption that the object photographed is identical with the object in issue. This assumption underlies, of course, all use of photographs, as it does that of all other forms of testimony. It represents the element elsewhere referred to as involving the principle of authentication, applied to chattels (§ 2130).

"Now ordinarily the evidence to support this assumption will be supplied incidentally and as a matter of course; e. g., the witness

will say, 'The front gate represented in this photograph, taken by me, is the same front gate referred to by Witness X as the place where the wagon drove in (or, the survey line started).' But it will often be desirable to establish *prima facie* this assumption by more explicit or more ample evidence. This will be so where the original conditions have concededly changed or disappeared and where there has been an *attempted reconstruction* of them, by artificial means, for the purposes of the photograph.

"Common examples of this are found in still photographs purporting to represent the relative location of freight cars, gates, and vehicles, at the place of a crossing collision; or of the alignment of machines, windows, materials, and operatives in a factory-room at the time of an injury. In such a case, there is always the possibility that the bias of the party or agent preparing the scene and taking the photograph has given to the reconstructed scene a misleading alteration, or has been content with a reconstruction which was only as close as is feasible to the original scene, but is put forward by him as actually identical with it. Here the trial judge may require sufficient evidence of a substantial identity of conditions before admitting the photograph. But instead, if any serious doubt exists on this point, the judge may well cause additional photographs to be taken on a scene reconstructed as the opponent's testimony alleges, if that is feasible.

"The foregoing element of weakness may reach its maximum in a *moving-picture*. In so far as such a picture has any value beyond a still picture, this value depends on the correctness of the artificial reconstruction of a complex series of movements and erections, usually involving several actors, each of them the paid agent of the party and acting under his direction. Hence its reliability, as identical with the original scene, is decreased and may be minimized to the point of worthlessness.

"Where this possibility is serious, what should be done? Theoretically, of course, the moving-picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened. And, moreover, the party's hired agents may so construct it as to go considerably further in his favor than the witnesses' testimony has gone. And yet, any moving-picture is apt to cause forgetfulness of this and to impress the jury with the convincing impartiality of Nature herself. In view of these inherent risks of misleading, the trial judge may well deem a picture unsafe and inadmissible when the introductory evidence has not convinced him that the risk is negligible.

"No general rule can be laid down as to the kinds of occurrences, artificially reconstructed, in which the moving-picture would have a special risk of misleading.

"But where the moving-picture is taken *without artificial reconstruction*, i. e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few mat-

ters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs."

A recent trial in California has led to some discussion of the subject in the professional photoplay press. The trial was for homicide, in the Superior Court of Colusa County, before Judge Ernest Weyand. He refused to admit a moving picture of a reconstructed scene purporting to represent the parties' conduct. But, in this ruling, upon a reconstructed scene, he saved an exception for a natural scene—the point dealt with in the last paragraph of the above-quoted text. His language on this point (as reported in the *New York Times*, Feb. 22, 1920, from the *Moving Picture World*) gives the subject good illustration:

"I may give some instances where I think it would be proper: Suppose the method of operation of some mechanical contrivance should be the subject of dispute, and it would be impracticable to show the actual operation of the contrivance to the court and jury; in my judgment, moving pictures that would fully show such operation should be received. Assume that the operator of a moving picture machine were taking a picture on the street showing the movements of men or machines and other movable objects, and an altercation or accident should happen within the scope of the machine, and thereafter the incident become the subject of legal inquiry; it would be gross error to refuse the introduction of the moving picture, if proven to have been honestly taken.

"I am informed that during a recent strike a moving picture machine was stationed in a secreted position and was made to photograph the actual movements of the strikers. Were this strike or the question as to who may have participated therein or the actions of the several participants to become the subject of judicial inquiry, a picture of the persons, their acts and movements so taken would be the very best evidence in such investigation.

"A picture showing the actual progress of a fire or a flood, or showing the action of a windstorm, should be received when it can illustrate any disputed issue or fact. In all these instances it will be noted that the direct fact in issue is shown in the picture."

J. H. W.

PSYCHOLOGY IN THE HOUSE OF LORDS.—Can a judge "misdirect himself?" Lord Shaw, in *Herbert v. Fox* (1916), 85 L. J. K. B. 441, is quite positive that the thing is impossible, though a number of his brethren of the House of Lords and Court of Appeal would appear to think differently. Thus does the Scottish law lord inveigh against a locution which to his mind signifies an assault at once upon the King's English and the laws of psychology:

"There is a view expressed in the judgment about to be delivered by Lord Wrenbury to which—in case it should be thought that I had assented to it, or to what might be assumed in it—I think it proper to refer. He speaks of a judge 'misdirecting himself.' This is a curious expression, and it, of course, is a transfer from

the region of thought of a judge misdirecting a jury. It is a 'façon de parler.' Where one mind directs or misdirects another mind or set of minds, the expression is correct; it represents reality. But when one mind is said to direct or misdirect the same mind, and a judge is said to direct or misdirect himself, the expression, if it is supposed to mean anything else than that he was right or wrong in law, is incorrect; it does not represent reality. No judge in the country is bound to attempt the impossible intellectual exercise of making his own mind direct his own mind, or preventing his own mind from misdirecting itself. The expression as to a judge having misdirected himself has crept, unfortunately, into common legal phraseology, especially south of the Tweed; but it is merely an unhappily chosen synonym for a judge having erred in law. This last—error in law—is a very simple idea; and it is to be regretted that it has ever been clothed in language fitted to describe an incredible psychological phenomenon.

"I hope and believe," he continues, "that we are agreed as to this, and I have only ventured to make these observations so as to indicate that I cannot see my way to accept the category set out in the judgment of my noble and learned friend of—first, a judge directing himself rightly; or secondly, misdirecting himself; or thirdly, not directing himself at all. The first means that his law was right; the second, that his law was wrong—no more; but the last does not seem to me to have any place in the range of consciousness or responsibility, and I should think well of a judge who disclaimed any task or duty of the kind, of making his own mind direct his own mind—of being himself at once directed and director—and said that he could not understand it if it meant something more than being either right or wrong. In the discharge of the difficult duties set before the County Court judges and judges of first instance it is not desirable that they should be confronted with a new perplexity."

It will be generally conceded that Lord Shaw has much the better of the argument. If Lord Wrenbury and his co-exponents of mental self-direction had any real hope of impressing their creation upon the matrix of legal ideas, they should have taken pains to furnish us with the necessary enlightenment. The least they could have done was to have made it plain which one, if either, of the selves in question—the Directing Self or the Directed Self—is to be identified with the Empirical Self, and have told us what particular niche in the hierarchical scale is occupied by either or both of the functioning selves. Not having so much as intimated whether the self-direction involved is consistent with the automaton theory, or given a hint of its relation to the integration of psychic units, what title could they claim even to a respectful hearing?

R. W. M.

ARE COURT OPINIONS TOO LONG?—It is said to be a rule followed in newspaper offices that a story must be told at least three times—once in the headlines, once in the opening paragraph, and

at least once more in the narrative. Each person interviewed will also repeat the story. Something of the same practice may be observed occasionally in judicial opinions. In the leading case, *Parsons v. Loucks* (48 N. Y. 17), a case selected for illustration for the reason that a comment on it can not offend any person now alive, the opinion is commendably short, but it could have been still shorter, except for the consecutive reiteration of the same fact (fully set out already in the statement of the case). Thus, the court says: (1), "the paper to be delivered was not in existence at the time," etc.; (2), "it was yet to be brought into existence by the labor and science of the defendants"; (3), "of the 20,000 pounds not an ounce had then been manufactured"; (4), "it was all of it to be created by the defendants"; (5), "it was a simple, naked agreement to manufacture at their own mills," etc.; (6), "indeed, there is no evidence that the rags and other materials used from which it [paper] was to be manufactured, were owned by the defendants, or were in existence," etc.

All this reminds one of the working over of a theme in a symphony; but opinions of judges are not symphonies, although we will concede that frequently they are art. Yet, we gather from these many variations, that the agreement concerned chattels to be brought into existence by the labor of the defendants; and, under the then New York rule, the Statute of Frauds did not apply.

A. K.

THE DEBTORS' COURT OF CHICAGO.—Section 64 of the Municipal Court Act (J. & A., II, Par. 3381) provides for supplemental proceedings upon a judgment in that court where the judgment, exclusive of costs and interest, exceeds \$25.

The first paragraph provides two modes of initiating the proceeding. At any time within seven years after entry of judgment and upon return of the execution satisfied wholly or in part a citation is issued. This citation orders the judgment debtor, or any other person or corporation which the creditor believes to have personal property of or is indebted to the judgment debtor in excess of any exemptions, to attend and be examined concerning the judgment debtor's property. Also the creditor may proceed immediately upon the issuance of the execution and before its return, upon filing his affidavit that there is reasonable ground to believe the judgment debtor has property within the city which he unjustly refuses to apply toward the satisfaction of the judgment, whether subject to execution or not.

The method used is a motion for the issuance of the writ with a petition setting forth the foregoing grounds. This petition is signed and sworn to by the judgment creditor or his duly authorized agent. When executed by an agent his authority should appear and his mere signature as agent is not sufficient (*Perry v. Kausz*, 167 Ill. App. 250).

The second paragraph provides that where it appears from the examination that the judgment debtor has in his possession or under his control money or other property belonging to him and not

exempt, the court may order him to pay the money, assign the chose in action or deliver the personal property to the bailiff, to be collected by him or sold at public auction. A similar provision applies to property in the possession or under the control of any other person or corporation where the judgment debtor's right to possession is not *substantially* disputed. The court's power is limited to personal property, and it has no jurisdiction to set aside a conveyance as in fraud of creditors: *People v. Cohen*, 163 Ill. App. 115. The order of the court is final and may be reviewed by writ of error: *Ill. Brewing & Malting Co. v. Ilmberger*, 155 Ill. App. 417.

The third paragraph provides for the appointment of a master in chancery or a special commissioner to conduct the examination. This provision is little used, for in actual practice the respondents and witnesses are examined in rooms adjacent to the court room.

The fourth paragraph provides for the examination of witnesses, postponement of hearings and issuance of subpoenas. The court has the power to compel the attendance of any party or witness by a body attachment. Upon refusal to appear or answer proper questions, the party or witness shall be in contempt of court and may, in the court's discretion, be punished by fine or imprisonment. Where the attachment is for failure to appear, it must be based upon affidavit as to the truth of the facts constituting the alleged contempt, and where the contemnor files an answer to purge himself, if sufficient on its face and not found untrue, an order of commitment cannot be issued (*Perry v. Kausz*, 167 Ill. App. 250, 2 A. L. R. 225 N.). While there is no provision apparently for the review of such an order, the appellate court will take cognizance of a writ of error under the common law: *People v. Cohen*, 163 Ill. App. 115. Where a judgment of commitment is reviewed, the order disobeyed is also reviewed (*People v. Cohen*, 163 Ill. App. 115), but the judgment debtor cannot obtain vacation of an order directing supplemental proceedings by showing that the judgment or execution was erroneous, and the order to appear must be obeyed unless there is an entire absence of jurisdiction: *Pirie v. Horwich*, 204 Ill. App. 379.

The fifth and sixth paragraphs refer to the assessment of costs. The seventh allows copies of orders to be served by the bailiff, the petitioner or his agent or attorney.

The proceeding provided gives a remedy akin to the creditors' bill in chancery as well as to that provided by the Garnishment Act. As a matter of practical application, the citation is used principally to frighten or annoy the debtor, except when occasionally a naïve respondent admits having property. This is caused in part by the fact that the third paragraph relating to master's hearings is a dead letter, and also because of the vast volume of citations daily. Their number is such that the court cannot give each case personal attention, and the solemnity of the oath loses some of its effect when not before the court. This is a problem of judicial administration and does not affect the possibilities of the debtors' court.

HAROLD J. HOWE.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS'
ASSOCIATION

185. *Question:* If it is contrary to the essential dignity of the profession for a lawyer to give, or permit another to give, a bond for him, conditioned on his fidelity, can a lawyer who accepts such a bond on another, knowing that the so-called bonded lawyer is acting contrary to the essential dignity of his profession, be held guiltless of a breach of ethics?

Answer: This Committee has heretofore in answer to specific questions expressed the opinion that it detracts from the dignity of the profession for a lawyer to enter into an arrangement either with a *collection agency* or a *law list* for the guaranty by them of his faithfulness in remitting commercial collections committed to his charge. The use of such baits by lay agencies as a means of securing business for themselves is to be condemned, and therefore, as this Committee has previously held, such guaranties of honesty by lawyers tendered to the public to be used in the solicitation of business are to be condemned. Since, in the opinion of the Committee, it is contrary to the essential dignity of the profession for a lawyer to give or to permit another to give a bond conditioned on his fidelity under the circumstances above stated, it is, in its opinion, also undesirable for a lawyer to accept such a bond under the same circumstances.

In giving the foregoing answer, the Committee has confined itself to the class of cases which it has heretofore considered and in which a collection agency or a law list derives an advantage from the guaranty of the faithfulness of a lawyer in remitting commercial collections committed to his charge through their agency. The question, however, is predicated upon a hypothesis which is broader than any previous statement of the Committee's opinion. If the hypothesis of the question is to be deemed limited to the cases in respect to which the Committee's previous opinions have by their terms been strictly confined, the foregoing answer is, in the opinion of the Committee, an adequate reply to the question, but if the question undertakes to assume, as it apparently does, that there is no situation in which an attorney can properly submit to the guaranteeing of his fidelity, then the Committee does not admit the truth of the hypothesis and consequently could not follow it to its logical conclusion.

There are many relations in life in which the guaranty of fidelity is an essential feature of the relationship—such as the bonding of executors, administrators, receivers, assignees for the benefit of creditors, employees or appointees of the federal government, officers of private corporations, etc. In these cases the fact that the incumbent is a lawyer is not recognized as a reason why he should be exempted from complying with the rules which have been adopted out of precaution for indemnifying against infidelity. The Committee is not of the opinion that in such cases lawyers should be regarded as an exempt or privileged class.

186. *Question:* (a) Can an attorney who has been disbarred by the courts from practicing law assist another attorney, not disbarred, in preparing papers, either complaints, answers or other legal documents, for or without remuneration?

(b) Is the attorney who employs the disbarred attorney guilty of unprofessional conduct?

Answer: In the opinion of the Committee:

(a) The *right* of the disbarred attorney to perform the services described in the question depends upon the construction of laws which probably vary in different jurisdictions (e. g., in New York, upon a construction of section 88, Judiciary Law. See *People v. Alfani*, 227 N. Y. 334; *People v. Title G. & T. Co.*, 227 N. Y. 366). This Committee does not undertake to pass upon such questions of construction.

(b) If, as a matter of law, the disbarred attorney is forbidden to render the services described in the question, then it is clearly improper for the practicing attorney to employ him for their performance. And, as a matter of professional propriety, the employment, by an attorney in good standing, of a disbarred attorney to perform any duties that lie in a doubtful zone between practicing law and not practicing law (including the duties specified in the question), should, in the opinion of the Committee, be disapproved, because such employment tempts and conduces to the violation of the plain intentment of any decree or order of disbarment. It cannot be doubted that disbarment is always and everywhere intended to deprive the disbarred attorney of the right to practice law, and even if the disbarred attorney be employed to render such services only as may not constitute "the practice of the law," yet there is in every such case the danger and likelihood that he will, under cover or cloak of such employment, perform such other services, either for his employer or for his own account, as under any construction of the law do constitute such practice.

HENRY T. TERRY.—Mr. Terry, now a resident of New York City, is Professor Emeritus of Law in the Imperial University of Tokyo; he is author of "First Principles of Law" (Z. P. Maruya & Co., Ltd., Tokyo), "Some Leading Principles of Anglo-American Law" (T. & J. W. Johnson & Co (Philadelphia, 1884), "An Elementary Treatise on the Common Law" (Z. P. Maruya & Co., Ltd., Tokyo, 1906), and of numerous legal essays in American and English law journals. His article in this issue on "Arrangement of the Law" is one of the series started some months ago on Legal Classification. It is the third article by Mr. Terry published in this REVIEW, the other two being "Equity" (REV. XII, 319) and "Possession" (REV. XIII, 312). In recognition of his achievements and distinction in analytical jurisprudence, Northwestern University in June, 1920, will confer on Mr. Terry the honorary degree of Doctor of Laws.—ED.

A. W. LAFFERTY.—The article by Mr. Lafferty in this issue is

his first contribution to this REVIEW. Mr. Lafferty is a member of the New York bar and is in practice at New York City.—Ed.

THE CASE OF FRANCIS AND MARY.—In T. Raym. 316 is reported the decision on demurrer, in 1680, of an action for words brought by Francis Walsul against Mary Allen.

"The plaintiff," we read, "declares that being a clergyman, the defendant said of him these words, viz.: 'Francis Walsul is a thief, and he stole plate from Mandlin College in Oxford; and I bought plate of one in Oxford, and gave it to the college for that plate, and thereby saved him from being hanged,' ad damnum 500l. The defendant pleads in bar by attorney, that ante diem, scilicet 1 July 12 Car. 2, the plaintiff married the defendant, and thereupon the plaintiff demurred; and adjudged for the defendant though pleaded in bar."

The account discloses just enough to arouse our curiosity. What was the domestic background of this procedural situation? Did Francis marry Mary unwittingly and know nothing of his matrimonial status until informed by the plea? Or was it that he merely forgot the fact of his marriage? Or did he sue with the resolute purpose of asserting that the marriage was void and fail in courage when it came to putting in the necessary replication? Perhaps the explanation simply is that the spouses fell out and William, unchivalrous soul, displayed his vindictiveness by suing his consort. But these questions, we fear, must remain unanswered. It is a pity that Francis, even at the risk of offense to the rules of pleading, did not exhibit a little less reticence in his declaration.

R. W. M.

ANDROSE VERS EDEN (Moore, 143). ILLITERATURE. Mich. 25 & 26 Eliz. rot. 342. Debt per Androse vers Eden sur obligac'on de 40. marks, dont le condic'on fuit, si Eden assigne tout son interest al Androse devant le 1. jour de January, les escripts de'e fait per Androse quod tunc, &c., a que Eden plead que Androse, le darrain jour de December un demy heure devant l'occasse del soleil vient al Eden & luy require de sealer certain escripts queux il amean ove luy, affirmant que ils fueront escripts pur conveyance del dit interest de luy al Androse, mes pur ceo que le def. fuit illiterate, & ne scavoit si fue'r escripts pur cest purpose & nul autre, il ne eux seal, & pria judgem't si acc'on. Le pl' demurre en ley. Et adjudge ove le pl'; car les Justices dient que les pols, que les escripts sr'ont fait per Androse, impliont que Androse est de p'parer les escripts, & de faire request devant que Eden est a faire asc'u chose; le temps de quel request, est asc'u temps devant le primer jour de January, ou al meins le darrain instant devant le dit jour, le quel Androse ad tout fait duem't; & si Eden ust mistrust que les escripts no voil estre fait accordant a lour agreem't, il puissoit aver p'vide home litterate d'aver e'e ove luy, al dit darrain instant; mes son ignorance demesne ne excusera le ley.

The above case reported a few years before Wil. Shakespeare, Gent., began to write, shows that 'homes illiterate' then fared no better in the law than now; but the headnote 'Illiterature' is what attracts attention. The case is not, as might be supposed, a sixteenth century supplement to censorship in advance. A. K.

BOOKS AND PERIODICALS

EQUITY: An Analysis and Discussion of Modern Equity Problems Designed Primarily for Students. By George L. Clark, S. J. D., Professor of Law, University of Missouri. Columbia, Mo.: E. W. Stephens Publishing Co., 1919. Pp. lii + 639.

COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA. By Joseph Story. Fourteenth edition, by W. H. Lyon, Jr. Three volumes. Boston: Little, Brown & Company, 1918. Pp.: I, cxcii + 545; II, viii + 683; III, viii + 682.

If Mr. Lyon's edition of Justice Story's classic work merited a review at all, doubtless it merited a prompt one, and a review even of Professor Clark's book already seems belated; yet inasmuch as the prime merits of the latter are conspicuous among the demerits of the former, a joint review of them, after time has permitted some test of their content, may perhaps, even at so late a day, be justifiable.

Mr. Clark's book is correctly represented by its title page. Any instructor acquainted with the notebooks of Harvard students will recognize that the book follows closely the traditions of the Cambridge classrooms (to which, indeed, Professor Clark makes broad acknowledgment). As an outline, and for the purpose of opening the student's mind to the general principles, the difficulties, and the obscurities of an immense subject, the volume has undeniably very great merits. Since human faith in printed matter is an ultimate fact in education—since students *will* read text-books, by all means let us have more and more books which, like Professor Clark's, are brief and in the main reliable. The questions discussed by Professor Clark, when raised only in the classroom discussion of cases, have many students with only the a-b-c of the problem; studied from the print they may be able with the instructor's aid to reach f-g-h—indeed, he might be able to assume the a-b-c in the discussion of cases. The reviewer therefore cannot agree with a teacher of equity who remarked that he would do his best to keep Mr. Clark's book out of the hands of students. It is a rumor that the book was written for night schools, but the publishers advertise that it is selling largely in the leading law schools of the country. With no prejudice against it on this account, the reviewer believes that Mr. Clark could have done better by his readers.

The analytical outline, the formal mould of the book, often seems superior to the content. By this it is not meant as a reproach that we are not given final solutions—that the analysis reveals problems that cannot there—perhaps not at all—be solved; for the revealing of these seems to the reviewer the foremost merit of the

book. But the method and the standard of the content are not uniformly satisfactory.

The meaning can be made clear by a couple of examples. Take the first from the chapter on Trusts. Nineteen pages are given to a discussion of the difference between a trust and various other legal concepts and relationships. The student necessarily brings to this discussion, from other courses, his concept of bailments, debt, etc., for the author cannot treat all subjects at once. But what of the concept of a trust? It cannot be said that he has to take this from the class discussion of the cases, for then why write a text-book? If this is to be written, the comparisons referred to ought to begin with an accurate summary description, followed, perhaps—after the “comparisons”—by a more exact definition. But Mr. Clark, neither at the beginning nor the end, defines a trust, though he does, at the beginning, imply that a trustee always holds a legal title in trust (§ 249). If 19 pages can be given to distinctions, at least a few lines could be given to an accurate general definition. This example is particularly fair to Mr. Clark, and it seems important because many minor matters in the book are treated similarly.

For a second illustration, take the treatment of mutuality. In explaining (§ 48) “mutuality”—meaning “mutuality as a basis for *giving* relief”—it is said that “it is a hard-and-fast rule that if the property is such that the court would have given specific performance to the buyer if he had sued for it, the seller may have specific performance.” Mr. Clark thinks that this principle “must be carefully distinguished” from the doctrine of “*lack* of mutuality,” this being “a ground for *denying* relief” in equity (§ 48). He tries, apparently, in this way to save the statements of Fry and of Pomeroy (§ 174), though developing—as did Dean Ames—various exceptions to their statements of the denial rule (§§ 175-180). To the reviewer the whole discussion seems muddled and unsatisfactory. As a matter of principle, he submits, the fundamental reasoning ought to be thus: (1) Equity aims to supplement the defective remedies of the common law. (2) Now, the latter’s remedy *may* be adequate for the vendor—though Mr. Clark, again not explicitly but (so much the worse for students) impliedly states the contrary in § 42. (He states, namely, that it is “a hard-and-fast rule” that “damages for the breach of a contract for the *sale and* purchase of any interest in land is always considered inadequate. . . . The number of instances where the . . . vendor could make a ready sale to another purchaser is so small as to be negligible.” The reviewer thinks that there was call and space for a reference to the variant rules as to damages for the vendor in such cases.) (3) When the vendor *has* an adequate legal remedy, a court of equity which accepts the “mutuality of remedy” instead of the “mutuality of security” principle, virtually says to the complainant, in *denying* relief: “We admit that your legal remedy is inadequate, and that therefore on the most fundamental principles of equity we should aid you; but we refuse aid to *you*, who need and should

have it, *because we would refuse it to the other party who would not need, nor therefore be entitled to it, his legal remedy being adequate.*" Or else it says to the complainant, in *giving* relief: "To be sure, your legal remedy is adequate, and therefore, under the fundamental principles of equity, you should not have our aid; yet we will give it you because the other party would *not* have an adequate legal remedy, and would therefore, under those same principles, be entitled to and would receive our aid." The first situation is Mr. Clark's "mutuality"—that is, as a basis for *giving* aid; the second is his "lack of mutuality"—as a basis for denying aid. As a matter of equitable principles there is absolutely no difference, of course, between them. *Those* should first be made clear to the student. If, then, because of legal rules relating to damages, there is a practical difference in the freedom enjoyed by equity in the application of its principles, let those points be clearly made: the damages rules analyzed and the resulting practical situations emphasized. Finally, the difference between theory and authority should be clearly shown. Does Mr. Clark accomplish this? In the reviewer's opinion, not at all. His discussion will impress a student as difficult and profound, but the student will be left in a fog. Mr. Clark points out *too obscurely* the fact that every *exception* to the Fry-Pomeroy "rule" of *denying* aid to one party because it must have been denied to the other, is an *example* of the general rule of *giving* aid when it is needed; had the general principles been thrown into high relief, and the above simple point been made in simple words, the student would appreciate adequately the ten exceptions that are listed. Possibly the reviewer does an injustice to the student, and so to Mr. Clark. It may be said, with reference to the above criticism, that much trouble has already come, and much will continue to come, from Dean Ames' unfortunate formulation of his rule of mutuality (3 Col. L. Rev., III, at pp. 2-3), which is left without any editorial note in his "Essays" (p. 371), although Professor Schofield pointed out the slip, and at the instance of Dean Ames corrected it, a dozen years ago (ILL. L. REV., I, 549); and, of course, any number of notes in the Harvard Law Review and elsewhere assume the amended formulation. Beginners, however, must be told these things explicitly and clearly.

There is hardly room, and perhaps no reason, for dwelling upon other criticisms. The above two seem to represent fairly certain defects of method which, despite the book's analytical form, pervade it. For all the show of analysis there is a frequent lack of exactness and of clarity, and it does not seem a fair record of the author's admitted competence and accomplishments. As for minor objections, the index is very inadequate, there are very erroneous cross-references, and of the cases cited or discussed those not to be found in Dean Ames' collection seem unduly few, giving the book a too-evident character as a first-aid to the endangered. On the other hand, the many references to notes and articles in law school reviews are most desirable.

For a student's purposes, Mr. Lyon's edition of *Story* seems almost worthless. The original text is full of curious arrangements, in its historical aspects it is antiquated, and its theoretical analysis is not abreast of our development. Upon one who tries to see the subject in historical perspective, and not on a flat plane of practitioner's fact, the whole work, as left by its successive editors, makes a curious impression. Many references are of course inevitable, while the text stands, to "the late English cases," "the latest decisions," the discussions "of late years"—cases and discussions now nearly a century old; and, similarly, such statements as that a wife "may make an application to the proper Ecclesiastical Court for a decree concerning conjugal relations," or that the establishment of a testament "belongs" to the same courts. But it does seem that the notes ought often to deal explicitly with subsequent historical developments, and not merely add a few modern citations; and this they very rarely do. Countless references remain, also, to obsolete text-books and to old (and unspecified) editions of obsolescent text writers. Not infrequently express queries in *Story's* original text or in the notes of some past editor—date and identity now undiscoverable—directly called for, and much more often their text gave opportunity for, comment on the historical development since *Story's* day, questions and opportunities which successive editors have generally ignored. In so doing they wholly departed from the spirit of the original work. Mr. Bigelow, it should be said, was an exception; for he, like Justice *Story* himself, was interested in pure scholarship. It would be most unjust to Mr. Lyon to imply that he has neglected all his opportunities. He has introduced a section (1296) on the protection of rights of personality, and another (1297) on the prevention of injuries to the right to enjoy the services of public utility companies. On the other hand, he reproduces too unqualifiedly the traditional proposition that equity will not enjoin criminal acts unless these endanger property rights (§ 1217). And in his discussion, in an original section, of the question to what extent courts of equity may deal with non-domestic law (§ 91; cf. § 1029), there is no reference to Professor Huston's book and the materials therein assembled. Indeed, unlike Mr. Bigelow, he fails throughout the work to refer the reader to materials gathered together in the leading law reviews and other "academic" publications. To return to the matter of history, in this fourteenth edition there are various whole chapters regarding which one wonders what modern cases there may be, English or American. One longs for a legal Croce, to tell us explicitly what is living and what is dead of the equity of Eldon, and when and how portions have died, and where and how other portions are living. But the historical aspects of the work are, as already said, by no means the only ones that cause one to consider whether another revision of the work was desirable. One can understand the pride of the publishers in maintaining the existence of a work that has so great a past, but to the reviewer it seems that it had reached such a physical state, of text and notes, that a revision was for that reason, and more so

for other reasons, undesirable. At any rate, if the work was to be given new life, the revision should have been thorough and scholarly; and there was time in thirty-two years to make it so. Without such, the work—though it might for a time continue to meet the ordinary “needs” of a practitioner—could be no contribution to the literature of the law.

Mr. Lyon’s edition does not meet such standards. Upon opening it one is pleased with the introduction of section headings in bold-faced type. One is even disposed to accept (one’s next discovery) the abandonment of the old section and chapter numbers, *until* one finds that no table is provided that makes available in this edition the countless references to the old divisions in other texts and in reports. However, the changes are made for good reason: one short chapter on Reformation (ch. 19) is wholly, and two others—on Subrogation and on Conversion and Reconversion (by wills)—are largely, original contributions by Mr. Lyon. Such radical changes indicate an ambition to make a book that is thoroughly new, and one proceeds with hopes, but the hopes are in the end disappointed.

Throughout the work revision is mainly confined to the mere citation of modern cases, but to some extent new sections, or passages, by the editor, are incorporated into the text. Such changes in the first two volumes are fairly uniform (about 150 in each); and though much fewer in the third volume (less than 50), it is true that the topics in the latter include fewer of fundamental importance, and that some (e. g., Estoppel, Set-off) receive relatively careful attention. On the other hand, the changes throughout the work seem to be casual, because apparently not corresponding to the actual growth in the law. Even infants, and idiots, and penalties receive some attention; awards and partition more. It seems odd, then, that after thirty-two years no textual change seemed desirable in the chapters on mortgages (ch. 30), wills (ch. 32), election (ch. 33—one new section in 50 pages), application of purchase money (ch. 35), and the status in equity of judgments at law (ch. 49). What shall be said of one new section in 107 pages in the chapter on implied trusts (ch. 36)? And of no change in that on bills of peace (ch. 25)? Of a dozen slight alterations in the 98 pages on injunctions (ch. 26)? Of nothing new on the protection of patents and copyrights (§ 1260 et seq.)? Of nothing on railroads (ch. 48)? Of five lines, in more than 60 pages, on married women? Of a five-line reference to real-party-in-interest-statutes (§ 1422) to bring down to date the topic of assignments (ch. 31)? Of course, Mr. Lyon *has* made from place to place textual interpolations which are welcome so far as they go. (Cf. §§ 408-410 on restraint of trade, and §§ 14, 90-93 on jurisdiction, and many other changes.)

As already said, however, Mr. Lyon has throughout added citations, even where there are no textual changes. How stands it with these? This can best be judged by taking some of the editor’s original sections. To support an interpolated page on the “Nature of the Doctrine of Specific Performance,” he cites one Pennsylvania

case (§ 988; on "the doctrine that the vendor's lien is not of universal application" (§ 1624)—his single change in the 107 pages on implied trusts—one case (from North Carolina, his own state); for the proposition that the distinction between legal and equitable assets is generally abolished (§ 773), one Missouri and one North Carolina case. Incidentally to the proposition that the enforcement of an oral contract to devise land in consideration of services performed is an established exception to the Statute of Frauds, he states eight "well-defined rules" covering exceptions to the statute, and cites again as authorities one Missouri and one California case (§ 1016a). He introduces a section on "Equity acts in personam rather than in rem" (§ 90), and qualifies that formula soundly enough, but he cites only four cases in support and illustration (with no references to Professor Huston's and Mr. Billson's books). If this is true of his own textual contributions it can easily be imagined that the recent cases cited through the book would be casual in selection and distribution. Such they seem to be. They do not record a consistent and thorough revision. On the other hand, he finds room for such propositions as: "The claim of him who has been guilty of gross laches is not looked upon with favor," citing one case, II, p. 454.

It would require many pages to indicate the specific points of doctrine the light thrown upon which by the editor seems to the reviewer inadequate. To refer first to specific performance, the editor's ideas of part performance seem totally inadequate; there is no indication that he sees in it more than a question of fact, and no hint of the efforts that have vainly been made to provide a rational theory to explain the cases (§ 1045, et seq.). No discussion of mutuality, either of remedy or security, has been located. No distinction is made (§ 1065) between total lack of title in the vendor and offer of an imperfect title (nor does Professor Clark advert to this, § 129). Story's sections on risk of loss (§ 145, et seq.) have certainly not been modernized by either the present or earlier editors; various of the classic cases (e. g., *Paine v. Meller*) are not cited, and there is no discussion of principles. On consideration and imperfect gifts (§§ 987, 1080-81) other opportunities were ignored.

Lord Hardwicke's statement, reproduced by Story, that "from the time of the contract for the sale of the land the vendor, as to the land, becomes a trustee for the vendee, and the vendee as to the purchase money a trustee for the vendor,"—Story adds: "who has a lien on the land therefor" (§ 1079)—would certainly seem to have invited comment by some editor, despite Story's addition; but has never received it. (Likewise, in another field, the definition of a trustee as one who is always a "legal owner," § 1304.)

If discontent be justifiable in the case of a topic relatively so rationalized as specific performance, one does not approach with hope the treatment of the mental element in juristic acts, as affecting the remedies of specific performance, reformation, and rescission. To these topics Mr. Lyon seems to have given unusual care.

In addition to a new chapter on reformation (§§ 973-85), he has contributed textual insertions to the extent of more than thirty sections (3, 156-72, 267-68, 271, 273, 275, 277, 280, 285-86a, 290, 298-99, 311, 932-33, 1065). Unfortunately, they are largely mere abstracts of cases—even to the point of such statements in the text (no quotations, ever) as, "It is settled in this state," etc. They are full of repetition, and are an extreme instance of editorial indigestion of cases.

In the first place, having seen the necessity of a separate chapter on reformation, one would expect Mr. Lyon to keep reformation and rescission *apart*, and mistakes of fact and of law *apart*, in his discussions, but, instead, these are full of blanket phrases like "lend its aid," and of jumble-statements like the following:

"If through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded" (§ 159, reproduced in 933).

"An instrument may be reformed in cases of fraud, accident, or mistake" (§ 159).

"A court of equity possesses the inherent power to grant relief in the rescission of a contract, and as a usual and necessary coincident to this relief, the granting of the relief of cancellation or reformation of the instrument as written" (§ 932, cf. § 976).

Of course, a properly informed reader might read the first quotation and approve it, but the other quotations show that in so doing he would be unduly charitable to their author. The same criticism applies to the treatment of mistakes of law, various scattered propositions relating to which are sound (§§ 164, 165, 166, 978-79), but are flatly inconsistent with other propositions (§ 156); and the whole matter should have been segregated and consistently developed.

In the second place, what is Mr. Lyon's conception of the elements of fraud in equity? At the very beginning of the work (§ 3), lest the text mislead us, he inserts a caution: "If the fraud amounts to *nothing more* than a mere tort, usually expressed by the phrase, 'an injury by fraud and deceit,' making a case in which the remedy at law is complete and fully adequate, there is no ground for equitable jurisdiction." Story's text is itself open to grave objections, for in a chapter headed "Actual or Positive Fraud," he starts out by remarking that "positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury" does not "include the large class of implied or constructive frauds which are within the remedial jurisdiction of a court of equity" (§ 263). He thereafter proceeded to ignore this distinction in his own chapter heading, and Mr. Lyon does the same. Sometimes, indeed, he seems to bear in mind the distinctions turning on scienter (§ 298), but hardly ever. Indeed, at the end of some thirty sections of discussion, and in the immediate presence of Mr. Bigelow's long note (to § 269) upon the differences between fraud at law, in estoppel, and

in equity, Mr. Lyon—avowedly attempting to define fraud—says: "Fraud is a wilful, malevolent act, directed to perpetrating a wrong to the rights of another," and thereupon proceeds to enumerate its ingredients and to state the scienter element in a way that is proper at law, since *Derry v. Peek*, in jurisdictions where that case is law, but is not accurate with reference to equity. Also, Mr. Bigelow having written in 1886, Mr. Lyon makes no addendum, based upon *Derry v. Peek*, to the former's note (I, p. 271), nor to the near-by passage of Story (§ 272) that equally invited such comment.

There are a few physical defects in the work (unaltered cross-references to old sections, brackets omitted from the editor's additions), but they are very rare. The volumes are physically handsome. Some day every classic has to be abandoned, and if that should now be the fate of this, at least it was put into a final creditable dress.

F. S. P.

BOOK NOTICES

THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION. By Warren B. Hunting, Ph.D. Johns Hopkins University Studies in Historical and Political Science: Series XXXVII, No. 4. Baltimore: The Johns Hopkins Press, 1919. Pp. 122.

INTERNATIONAL CONCILIATION: American Association for International Conciliation, New York City.

Number 143: October, 1919: Comments by the German Delegation on the Conditions of Peace. Pp. 141.

Number 144: November, 1919: Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace. Pp. 88.

Number 145: December, 1919: Agreements between the United States and France and between England and France, June 28, 1919; Anglo-Persian Agreement, August 9, 1919. Pp. 25.

Number 146: January, 1920: International Labor Conventions and Recommendations. Pp. 48.

Number 147: February, 1920; Some Bolshevik Portraits, Pp. 26.

THE DECISIONS AND DICTA OF THE SUPREME COURT OF ILLINOIS AS APPLIED TO THE WORKMEN'S COMPENSATION ACT IN FORCE 1912-1919: with Notes, Rules, Forms, and Procedure. By George A. Schneider, Counsel for the Industrial Commission. Chicago: George A. Schneider, 1919. Pp. 633.

REPORT OF THE FORTY-SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION: Held at Boston, September 3, 4, 5, 1919. Baltimore: The Lord Baltimore Press, 1919. Pp. 789.

FAIR VALUE: The Meaning and Application of the Term 'Fair Valuation' as Used by Utility Commissions. By Harleigh H. Hartman, M. A., LL. M., Lecturer in Illinois Public Utilities Law at Northwestern University School of Law. Hart, Schaffner & Marx Prize Essays, XXVIII. Boston and New York: Houghton, Mifflin Company, 1920. Pp. xix + 263.

ARTICLES IN PERIODICALS

- LEGAL PREPARATION TESTED BY SUCCESS IN PRACTICE. *Lauris Vold*. 33 Harv. L. Rev. 168.
- DELIVERY OF LIFE INSURANCE POLICY. *Edwin W. Patterson*. 33 Harv. L. Rev. 198.
- LIMITATIONS UPON AMENDING POWER. *William L. Marbury*. 33 Harv. L. Rev. 223.
- CIVIL PROCEDURE, 1918-1919. *Austin W. Scott*. 33 Harv. L. Rev. 236.
- BILLS AND NOTES, 1918-1919. *Zechariah Chaffee, Jr.* 33 Harv. L. Rev. 255.
- DEPENDENT RELATIVE REVOCATION. *Joseph Warren*. 33 Harv. L. Rev. 337.
- RIGHTS OF IDEAS—AND OF CORPORATIONS. *T. Baty*. 33 Harv. L. Rev. 358.
- IMPLIED-IN-FACT CONTRACTS AND MUTUAL ASSENT. *George P. Costigan, Jr.* 33 Harv. L. Rev. 376.
- STATE SOCIALISM AND SCHOOL LAND GRANTS. *Andrew S. Bruce*. 33 Harv. L. Rev. 401.
- EQUITY, 1918-1919. *Roscoe Pound*. 33 Harv. L. Rev. 420.
- SEPARATION OF GOVERNMENTAL POWERS. *Frederick Green*. 2 Ill. L. Bull. 373.
- JUDICIAL SYSTEM AND NEW CONSTITUTION. *Herbert Harley*. 2 Ill. L. Bull. 417.
- NON-NEGOTIABLE BILLS AND NOTES. *Herbert F. Goodrich*. 5 Iowa L. Bull. 65.
- UNWHOLESOME FOOD AS SOURCE OF LIABILITY. *Rollin M. Perkins*. 5 Iowa L. Bull. 86.
- OLD SCOTS LAW OF HERESY. *H. Hilton Brown*. 31 Jurid. Rev. 199.
- AN ELIZABETHAN PRECEDENT BOOK. *Francis Watt*. 31 Jurid. Rev. 208.
- THE FRENCH ADMINISTRATIVE COURTS. *F. P. Walton*. 31 Jurid. Rev. 225.
- PSYCHOLOGICAL EXPERIMENTS IN TRADE-MARK INFRINGEMENT. *Edward S. Rogers*. 18 Mich. L. Rev. 75.
- ARE CHARGES AGAINST MORAL CHARACTER OF CANDIDATE FOR OFFICE CONDITIONALLY PRIVILEGED?—II. *Jeremiah Smith*. 18 Mich. L. Rev. 104.
- EXTENSION OF LIABILITY OF ABSTRACTERS. *Harry R. Trusler*. 18 Mich. L. Rev. 127.
- ADMINISTRATIVE LEGISLATION. *John A. Fairlie*. 18 Mich. L. Rev. 181.
- DURATION AND TERMINATION OF OFFER. *Herman Oliphant*. 18 Mich. L. Rev. 201.
- INTRINSIC LIMITATIONS ON CONSTITUTIONAL AMENDMENT. *George D. Skinner*. 18 Mich. L. Rev. 213.
- WRITS V. RIGHTS: AN UNENDED CONTEST. *Lyman P. Wilson*. 18 Mich. L. Rev. 255.
- IS ASSIGNEE OF CONTRACTS LIABLE FOR DELEGATED DUTIES? *Grover C. Grismore*. 18 Mich. L. Rev. 284.
- THE FICTITIOUS PAYEE. *Victor M. Kulp*. 18 Mich. L. Rev. 296.
- EQUITABLE RELIEF AGAINST NUISANCES AND SIMILAR WRONGS IN MISSOURI. *George L. Clark*. 20 U. of Mo. Bull. No. 32: Law Ser., 17.
- DEPORTATION OF ALIENS. *Howard L. Bevis*. 68 Penn. L. Rev. 67.
- REVISING THE CONSTITUTION OF PENNSYLVANIA. *Shippen Lewis*. 68 Penn. L. Rev. 120.
- GUARANTIES AND STATUTE OF FRAUDS. *John D. Falconbridge*. 68 Penn. L. Rev. 137.
- COMPARATIVE STUDY OF CO-OWNERSHIP AND PARTNERSHIP. *Ildefonso deG. Mendiola*. 6 Philipp. L. Jour. 133.
- JUSTICE OR LITIGATION? *Herbert Harley*. 6 Va. L. Rev. 143.
- "LIFE, LIBERTY, AND LIQUOR." *Lindsay Rogers*. 6 Va. L. Rev. 156.
- BOARD OF CONTRACT ADJUSTMENT OF WAR DEPARTMENT. *Jennings C. Wise*. 6 Va. L. Rev. 182.

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RECENT PHASES OF CONTEMPORARY LEGISLATIVE PROPOSALS

BY JOHN H. WIGMORE

Amidst the confused flood of proposals for change and reform of the law there is a certain steady current of proposals which naturally have a special interest and duty for the lawyer. They concern him professionally, and not merely as a citizen, or as devotee of some incidental interest such as athletics or stock speculation.

These subjects form the theme for reports and discussion in a unique course entitled "Practical Problems in Contemporary Legislation," conducted now for some ten years past, each year, at Northwestern University Law School. The purpose and method of the course are described in a leaflet obtainable at the school office. Suffice it to explain that for the initial assistance to the members in framing their reports a "List of References on Problems of Contemporary Legislation" was printed in June, 1914; being the third edition of that document, and containing some 700 entries. Since that date numerous new references have been gathered, continuing the discussions and starting new proposals. These will serve as a supplement to the third edition of the "List of References." At the same time, they will serve as a time-saver for lawyers interested in these problems. There could be no more stimulating exercise for any lawyer than to glance at some of these articles and books, on any of the topics represented, and make acquaintance with the themes that form the bulk of today's discussion about law changes.

The topics covered are only those which (1) have given rise to more or less public discussion in legal periodicals, and (2) concern distinctively "lawyers' law," i. e., that common law or tradi-

tional statutory law which usually enters into a lawyer's practice; thus they exclude topics invoking purely economic or political considerations and changes in public law.

Looking over the titles of these articles one notices certain trends since the third edition of the "List of References." A few words of comment will here be offered in passing:

TOPIC 1. *Remedies for the Defects in the System of Using Expert Testimony at Trials.*

Thus far no progress seems to have been made in the practical use of any of the proposed remedies. Meanwhile the exposure of the defects has extended to include the special fields of rate-valuation and mining titles.

TOPIC 2. *Criminal Justice in the Courts; (a) Definition of Crimes; (b) Organization of Judiciary; (c) Procedure; (d) Organization of the Bar.*

In the first of these four divisions nothing new is in sight. In the third, the only topics receiving more than casual attention are the grand jury, the public defender, and the privilege against self-crimination. The Ohio constitution has recently permitted inferences to be drawn from a claim of privilege.

In the second and fourth divisions, the subject is usually considered together with that of Topic 6.

TOPIC 3. *Abuses of Personal Injury Litigation.*

Here the two features emerging into pointed discussion are the regulation of contingent fees, and the validity of bedside releases; though the latter has not yet entered the field of legislation. The notable topic is Mr. Ballantine's proposal to reduce to an insurance basis all accident liability to outsiders similar to that of employer's liability; and this deserves wider consideration for its advantages and its difficulties.

TOPIC 4. *Compulsory Registration of Land Titles.*

The adoption of the voluntary system in Virginia and California, and the completion of the Uniform Act by the National Conference, has brought this topic more to the front. Two American manuals now exist; and a body of American experience is becoming available.

TOPIC 5. *Regulation of Insurance Methods.*

This continues to be a subject of live interest and frequent official report. Though the technicalities of the rate-making question predominate, this field includes a variety of legislative proposals, in unrelated fields; and a few States have reached the advantage of enacting Insurance Codes. The Federal model draft code for the District of Columbia, approved by the American Bar Association, still awaits report in Congress.

TOPIC 6. *Civil Justice in the Courts; (a) Organization of the Judiciary; (b) Procedure; (c) Organization of the Bar.*

In all three of these divisions, notable progress is being made in the discussion of specific remedies; the stage of mere complaint and exposure of defects is passing away.

In the first division, the central point of discussion is the American Judicature Society's plan for a single State court system. Bar Associations in several States are making it a theme of debate.

In the second division, the topic claiming most attention is the relegation of rules of procedure to the judiciary to control by rules of court. Here, too, the Bar Associations are in active discussion. The proposed uniformity of Federal procedure occupies the second place of interest, but is not receiving anything like adequate attention in Congress. U. S. Senate Bill 1214, now pending for nine years, is due for early action, however, and will mark a new era in Federal procedure.

In the third division, the incorporation of the bar has now become the center of interest. One Bar Association has approved a draft act, and others are placing the subject on their programs. Three or four States possess now reformed Practice Acts which are furnishing useful experience.

TOPIC 7. *Employer's Liability and Workmen's Compensation.*

This topic has now virtually passed from the field of legislative problems into that of administration.

TOPIC 8. *Indeterminate Sentence, Probation, and other Modern Methods in Penology.*

Here the chief measures of the past decade are receiving statistical light as to their effectiveness. Among new methods requiring legislation, the chief one in the realm of discussion is the employment of psychiatric advisers in criminal courts. There is

still a large field here for more specific legislative novelties, such as the abolition of small fines, and the substitution of summons for arrest.

TOPIC 9. *Legal Control of the Air.*

Here the literature is rapidly increasing. Some progress is being made towards a consensus as to the fundamental legal theory of air-rights. Most of the practical discussion has centered upon international rights and upon government regulations to protect national rights.

TOPIC 10. *Performing Treaty Obligations by a Federal Law.*

This topic seems for the time to have fallen into abeyance in public discussion. But the bill approved by the American Bar Association is still pending in Congress.

TOPIC 11. *Bankruptcy Legislation.*

This topic also receives little or no attention as involving new legislation. The Bankruptcy Act has apparently come to stay this time; the occasional movements of a decade ago to repeal it have ceased. It is now only a subject for amendment of details.

TOPIC 12. *Trial by Jury in Constructive Contempt Cases.*

Here the war and its aftermath has brought temporary cessation of public debate. Doubtless the measure favored by the labor unions has been introduced again, as it regularly is, in many legislative sessions; and the issue is still pending, though perhaps its early settlement is not impending. Those who oppose this radical measure must still be prepared to face a legislative conflict.

TOPIC 13. *Migratory Divorce and Uniform Divorce Procedure.*

This subject still remains awaiting a solution. The conditions giving rise to the problem remain apparently unchanged; and among the various proposed solutions no one appears yet to have received special concentration of effort nor to be emerging into legislative favor.

TOPIC 14. *Conflicts of State Incorporation Laws.*

Here also the untoward conditions creating the problem remain unabated. Under recent tax legislation, some of the evils are intensified. Useful discussion still emanates in current reports and

periodicals. The Uniform Corporation Act is due for early adoption by the National Conference; and this measure, if promptly finding favor in the Legislatures, will solve some features of the problem.

TOPIC 15. *Restrictive Business Methods in Marketing Patented, Trademarked and Copyrighted Products.*

This topic has now come to the center of the stage among problems of commercial legislation. Various distinctions of theory continue to be worked out in judicial decisions. The provisions of the Clayton Act of 1914 have given a new turn to a part of the problem. But the general solution remains as much of a puzzle as ever; and a complex field of business practice requires to be first studied. Possibly the Federal Trade Commission's rulings will develop a workable code—if (as noted below, under Topic 18) the Federal Supreme Court does not shackle it too heavily.

TOPIC 16. *Extension of Copyright Statutes to Meet Modern Conditions of Industrial Invention and International Trade.*

Apparently there is here little remaining for legislative proposals as to the status of the new inventions. Only in its international aspects does this subject now present problems.

TOPIC 17. *Methods of Trying and Punishing Juvenile Offenders.*

Here there is now little to chronicle in the way of new legislative proposals; except the measure for extending the age jurisdiction of juvenile courts. But the small number of such courts yet in existence shows that in most States there is still need for propaganda to establish them.

TOPIC 18. *Control of Commercial Combinations.*

Here the two notable new features in the discussions are the modification of the Sherman law for international trade and the body of principles to be adopted by the Federal Trade Commission.

The former has led to much weighty comment on the Webb Act.

The latter is now in a fair way to be elucidated, in view of the Commission's five years of practice. Copious discussion is now available. But the Federal Trade Commission seems destined to pass through a period of jealous handcuffing on the part of the federal courts, similar to the long period of manacled ineffectiveness to which its elder brother, the Interstate Commerce Commission, was subjected by their common stepfather, the Federal

Supreme Court, in the closing years of the 1800's. The majority opinion in *Federal Trade Commission v. Gratz* is an omen of this. The masterly dissenting opinion of Justices Brandeis and Clarke squarely presents an issue which should receive the earnest attention of all who concern themselves with sound legislative and administrative solution of this problem.

TOPIC 19. *Remedies for Abuses of the Writ of Habeas Corpus.*

For some reason this subject no longer is debated. Either the abuses have diminished, or the writ is less used. Certainly, no remedy has intervened.

TOPIC 20. *Needs and Possibilities of Uniform Legislation.*

This is a rich field for earnest and able effort to perfect legislative progress. The discussion is copious; but not enough leaders of the bar are giving due attention to this work.

The experience under some of the uniform laws is now giving ample material for empiric tests of success, and for devising new expedients to cover the shortcomings of method. The scope of subjects to be embraced by the labors of the National Conference is now pending settlement. And a special importance attaches to the use of State compacts (under U. S. Constitution, Art. X) for attaining an effective uniformity.

TOPIC 21. *Regulation of Professional Ethics.*

Though professional standards and practices may or may not have improved since the clarification produced by the American Bar Association's Code of a decade ago, the public discussion seems now to have settled down to three specific topics, viz., the abuse of contingent fees by attorneys for plaintiffs in personal injury claims; the competition by trust companies, debt-collectors, and other agencies in the lawyer's professional field; and the disciplinary control of the bar by better organization. All three of these proposals are receiving valuable contributions. The first and third topics branch over into the fields of No. 3 (Abuses of Personal Injury Litigation) and No. 6 (Organization of the Bar), as already noted.

TOPIC 22. *Reform of the Jury System.*

Considering the ever-present nature of this problem, and the universal scope of its bearing, it is unaccountable that so little attention is given to it in professional discussion. The lack of

records of systematic studies of the experience in the few States that have tried radical changes is no less than a disgrace to the Bar. What is now needed is the concentration of debate on a few specific measures, and a resolute movement to enact those which receive prima facie approval. The issue is bound to arise before long between the intelligent demand for radical change and the obstinate opposition by those interests which are unfairly favored by a weak jury system.

TOPIC 23. *Trial of the Criminal Insane.*

This problem has advanced no nearer solution than ever. Just now the issue is deadlocked between Professor Keedy's proposed expedients and Professor Ballantine's strictures on their theoretical incorrectness. The methods employed in Federal military practice here deserve attention.

TOPIC 24. *Uniformity of Bills of Lading.*

Although the "standard bill of lading," as approved a few years ago by the Interstate Commerce Commission, brought a state of rest for this problem, in some regions and for some features of the contract, the complete and permanent solution was not in sight. The *Croninger* case, in 1913 (*Adams Express Co. v. Croninger*, 226 U. S. 491); the ensuing change of railroad practice in enforcing the value-limitations; the Cummins Amendment of 1915 (St. March 4, 1915, c. 176, 38 Statutes at Large 1196); the Pomerene Act of 1916; the Transportation Act of 1920; and the Commerce Commission's orders of 1919 and 1920 (52 I. C. C. R. 671), have given new angles to the problem. And the Federal Supreme Court's attitude in reversing the Interstate Commerce Commission (*Chicago M. & St. P. R. Co. v. McCaull-Dinsmore Co.*, May 17, 1920, 40 Sup. 504) on an important feature of the standard bill as affected by the Cummins Amendment, as well as the American Bar Association's First Tentative Draft of a bill to amend the Pomerene Act, show that the cauldron is still boiling and likely to continue boiling.

TOPIC 25. *Abolition of the Death Penalty.*

There is little or no movement here perceptible. The disgraceful lack of criminal statistical records in this country makes it virtually impossible to argue this question other than *a priori*; which often leads nowhere.

TOPIC 26. *The Proposed Right of Privacy.*

In spite of the enormous extension of commercial publicity methods, no special interest is shown in the prevention of its abuses. New York's law seems thus far to remain alone—and the judicial interpretation of it shows that an effective measure is hard to formulate.

TOPIC 27. *Methods of Legislative Draftsmanship.*

This subject is beginning to receive the attention it deserves, though seldom in effective quarters. The gradual establishment of legislative reference bureaus in the States, and the progress of the American Bar Association's Code of Legislative Drafting, tend to clarify the several objectives. The treatises of Jones and Freund now form a worthy nucleus of American systematic literature; and the official publications in Wisconsin, Illinois, Kansas, Iowa, Nebraska, North Dakota, and elsewhere, are developing a useful body of experience.

TOPIC 28. *Legal Problems Arising Out of Alien Immigration.*

The convulsed conditions of the war, and the after-war concentration on the social and administrative side of Americanization, seem to have diverted all interest in its legal side. The problems here are so unrelated, and so narrow in their relative importance (e. g., the improvement of the interpreter system in criminal courts), that little systematic attention can be invoked for them.

TOPIC 29. *Creating an International Court of Justice.*

This noble objective was only obscured, not superseded, by the League of Nations issue. It remains as much of a problem as ever. The experience of the war has merely assisted somewhat in estimating the workable aspects of some of the proposed methods. The copious literature now available ranges far outside the ordinary professional sources; but the solution, as ever, remains for the lawyers to devise.

TOPIC 30. *Codification as a Remedy for Uncertainty and Bulk of the Substantive Law.*

Three features combine to bring this question more and more into the foreground of practical debate.

One is the ever-increasing incubus of the mass of judicial decisions. Our duty to the next generation requires that we should

begin now to face the intolerable consequences of delay. Another is the definite progress made by the New York Consolidation, and the opportunity of studying the experience under it. A third circumstance is the information now available in English as to the modern continental codes and their various revisory methods. What is now needed is a definite study of the methods and experiences under distinct types of statutory bodies of law.

TOPIC 31. *Industrial Courts for Judicial Settlement of Industrial Disputes.*

The last few years have seen this problem arrive at the stage of a definite legislative issue. There is now a respectable body of materials for discussion; and an early enlargement of the field of experiment may be predicted.

TOPIC 32. *Commercial Arbitration.*

The tendency to remove commercial disputes from trial by jury to decision by arbitration has long been apparent, especially in England. Pending the improvement of civil procedure, this tendency seems to be worth encouraging. A statutory facilitation of it is the natural step. In a few metropolitan regions, some quiet efforts have been made; and the subject is now fairly on the stage for observation. In Pan-American international relations, there is already a useful record of experience.

TOPIC 33. *Repression of Automobile Larcenies.*

The organized depredations upon automobile property involve enormous money losses, and raise a question of police effectiveness. But they also naturally lead to proposals concerning new penal laws and interstate comity of action. A genuine problem for the legislator is here presented; can the law, as such, do anything more to assist towards a remedy?

TOPIC 34. *Defects of Patent Law and Administration.*

The patent-law branch of our profession has long realized that a condition of expensive, unjust, and time-wasting inefficiency exists in some parts of our patent system. It involves both the substantive law, the organization of courts, and the procedure. As our patent-law brethren do not seem to agree entirely upon what is needed, and as at any rate they have not secured satisfactory reme-

dies, the subject deserves the active attention of the entire profession.

TOPIC 35. *Control of Speculative Promotion (Blue-Sky Laws).*

The protection of the gullible investor (often as greedy as he is innocent), by administrative interference with the promoter's freedom of action, has not appealed to our Herbert Spencerian, *laissez-faire*, *caveat emptor* instincts until very recent years. But the blue-sky laws have come to stay, and a distinct field of practice under them has already grown up, with scarcely any agronomic attention to the field of principle involved. What is now needed is a study of the fundamentals of this legislation, and of the inferences to be drawn from experience under it.

TOPIC 36. *Repression of Profiteering in Housing and Other Necessaries.*

The distinctive feature of this most recent form of price-exploitation of the consumer is that it cannot be attributed to corporations as such nor to combinations as such. Hence the measures of the past generation based on those two objectives afford no solution for reaching that form of profiteering which may be effected by an individual citizen, acting alone, possessing only small capital, and owing his power solely to an excess of demand over supply, caused by extrinsic conditions. Hence the economic problem is to draw the line between the healthy operation of the natural principle of demand and supply and the abuse of that principle in specific cases. Can this be wisely done by law?

In the rentals-branch of profiteering, the first thought was to amend the landlord-tenant law and procedure; and New York promptly did this. Whether the natural impulse to strike thus at the conscienceless and contemptible profiteer should be yielded to, or whether the only relief that can be wisely expected must come through economic enlargement of supply, is the great problem for the legislator of today.

TOPIC 37. *Justice for the Poor.*

A cross-section of several of the foregoing topics, with their proposed remedies, reveals that justice for the poor offers a distinctive field of study and remedy. Speedy and inexpensive legal aid to those who cannot afford time or money if the law is to help them at all—this has become genuinely an objective which can

and must be considered, apart from any other pending problems, each of which might afford fragmentary solution of this one. The public defender, the legal clinic, the legal aid bureau, the court of conciliation, the small claims court,—all of these elements can now furnish much experimental material. No duty is plainer for our profession than to give them active attention.

TOPIC 38. *Regulation of Radio-Communication.*

Although this subject has thus far received legal attention only in its international and military aspects, and by means of conventions and administrative regulations, it is certain also before long to develop controversies in the field of private law. In view of its distinctive mechanical novelty, it raises questions of principle which ought perhaps to be solved at the outset and embodied in formal legislation.

List of Abbreviations Used

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| A. A. P. S. C.....Annals of the
American Academy of Political
and Social Science. | C. L. R.....Columbia Law Review |
| A. J. I. L.....American Journal of
International Law. | Cal. L. R.....California Law Review |
| A. L.American Lawyer | G. B.Green Bag |
| A. L. R.....American Law Review | H. L. R.....Harvard Law Review |
| A. L. Reg...American Law Register
(Pennsylvania Law Review) | I. L. R.....Illinois Law Review |
| A. P. S. R.....American Political
Science Review | J. R.....Juridical Review |
| C. L. J.....Central Law Journal | L. M. & R...Law Magazine & Review |
| | L. Q. R.....Law Quarterly Review |
| | M. L. R.....Michigan Law Review |
| | Pa. L. R...Pennsylvania Law Review |
| | V. L. R.....Virginia Law Review |
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PROOF BY SECURED CREDITORS IN INSOLVENCY AND RECEIVERSHIP PROCEEDINGS

BY RALPH E. CLARK

A bare majority of the Supreme Court of the United States, in the case of *Merrill v. National Bank of Jacksonville*,¹ held that a secured creditor of an insolvent national bank may prove, and receive dividends upon the face of his claim as it stood at the time of declaration of insolvency, without crediting either his collateral or collections made therefrom after such declaration, subject always to the provision that dividends must cease when, from them and from collaterals realized, the claim has been paid in full. The National Bank Act had and has no provision covering the question on what basis such distribution should be made; therefore, the majority of the Supreme Court applied what they determined were the true usages and rules of equity covering the case. The case of *Merrill v. National Bank of Jacksonville* followed and quoted with approval a very exhaustive and learned opinion covering the same subject by Judge William H. Taft, then Judge of the Circuit Court of Appeals of the Sixth District, in the case of *Chemical National Bank v. Armstrong*.²

The rule laid down by the majority opinion in *Merrill v. National Bank of Jacksonville* is the so-called chancery rule. The rule permitting the secured creditor to prove only for the deficit after collecting his collaterals is the so-called bankruptcy rule. The origin and the development of these two rules are shown and traced in the majority and dissenting opinions in *Merrill v. National Bank of Jacksonville*. It is there shown that several important English cases prior to the English Judicature Act of 1873 took opposite views of the situation. However, subsequent to 1873, there are no conflicting English decisions, because the rule of proof by a secured creditor against the assets of an insolvent estate of a deceased debtor and of an insolvent corporation in process of liquidation must now follow the bankruptcy rule because of section 10 of the Judicature Act. That section enacts that in the administration of the assets of a deceased person or of an insolvent company,

1. (1898) 173 U. S. 131.

2. (1893) 16 U. S. Appeals 465; 59 Fed. 372; 8 C. C. A. 155; 28 L. R. A. 431; 65 Fed. 573; 13 C. C. A. 47.

"The same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."³

In spite of a strong dissenting opinion by Mr. Justice White in the case of *Merrill v. National Bank of Jacksonville*, the chancery rule has prevailed in the Supreme Court of the United States and has never to our knowledge been specifically and directly overruled.⁴ However, Mr. Justice Holmes in the recent case of *Wm. Filene's Sons Co. v. Weed*,⁵ lays down some principles of the law of receivers which are fundamental and which appear to us to be contrary to the theory on which *Merrill v. National Bank of Jacksonville* was decided. It is interesting to note that Mr. Justice White, who in 1898 wrote the dissenting opinion in *Merrill v. National Bank of Jacksonville*, was Chief Justice of the Supreme Court in 1917, and as far as appears from the record, concurred in Mr. Justice Holmes' opinion in the case of *Wm. Filene's Sons Co. v. Weed*. It is our purpose to analyze these two decisions and to discuss at length the principles involved bearing on the question of proof of claims and distribution of an insolvent's property among secured and unsecured creditors.

Mr. Chief Justice Fuller in *Merrill v. National Bank of Jacksonville*, said—

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material."

Mr. Justice Holmes in the case of *Wm. Filene's Sons Co. v. Weed* did not lay down any revolutionary principles of equity, but made a simple statement as follows:

"When the courts without statute take possession of the assets of a corporation under a bill like the present (bill for equitable relief and asking for a receiver to distribute the assets of an insolvent corporation) and so make it impossible to collect debts except through the court's hands, they have no warrant for excluding creditors or for intro-

3. *In re Withernsea Brickworks* (1880) 16 Ch. D. 337 at 341.

4. *Aldrich v. Chemical Nat. Bk.* (1899) 176 U. S. 618. See *Chemical Nat. Bank v. Armstrong*, note 2; *In re Shats* (1918), 251 Fed. 351. See, however, *Westinghouse Elec. & Mfg. Co. v. Idaho R. L. & P. Co.* (1915), 228 Fed. 972.

5. (1917) 245 U. S. 597.

ducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for proof of claim. But they have no authority to give the filing of the bill the effect of the filing of a petition in bankruptcy, so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made."

If Mr. Justice Holmes is right and it is true that neither secured nor unsecured creditors obtain by the appointment of a receiver any supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept, then a court of equity distributing the assets of an insolvent person or corporation must recognize these contracts and substantive rights as they find them when the court makes distribution. If before appointment of receiver, a secured creditor collects his collateral and sues the insolvent on his original claim, a judgment rendered on such a suit will be for the balance due after deducting the amount realized on collateral. This is undoubtedly the law. If after receiver is appointed, this same secured creditor collects his collateral and sues the insolvent in a court of law, he certainly could not recover a judgment against the insolvent for more than the balance. If he presents his original claim for payment to a court of equity such a court could not, we think, render judgment on this claim or what amounts to the same thing, allow this claim for any more than the balance due after deducting the amount realized from the collaterals. This proposition, we believe, naturally and logically follows from the elemental statement of Mr. Justice Holmes, that courts of equity have no warrant for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditor to accept. Our reasons for agreeing with Mr. Justice Holmes, and disagreeing with the majority of the Supreme Court in *Merrill v. National Bank of Jacksonville*, and *Chemical Bank v. Armstrong*, which we will refer to later on, are as follows:

The theory upon which relief is given under a so-called creditors' bill, or a bill brought by one creditor on behalf of all in the administration of the assets of an insolvent corporation, is that such assets form a trust fund of which the creditors are the cestuis que trustent. In order to administer this trust, receivers are appointed to preserve the property pending the ascertainment of the rights of creditors as to priority and amount.⁶

6. Clark, "Receivers," Vol. I, sec. 479.

When we say that the creditors are cestuis que trustent, this does not mean that any or all of them necessarily have any lien on the general assets or that they have any fixed legal or equitable interest in such assets which has attached like a lien at the time of appointment of receivers. The cestui que trust is a beneficiary of the estate, but the purpose of the appointment of receiver among other purposes, is to ascertain exactly what are the rights of creditors as to priority and amount, and exactly what each creditor may be entitled to receive out of the assets as it shall be made to appear. An unsecured creditor has been deprived of his remedy of securing judgment and having execution issued. In place of this remedy he may present his claim in equity against the receiver, as the appointing court may provide. The appointment of receiver, has, it is true, taken away some of the creditors' remedial rights; it has not, however, taken away any of the creditors' substantive rights, neither has it added any substantive rights to the creditors. It is true that no one can be deprived of his property without due process of law, and in a case of *A v. B*, C's property rights or substantive rights can not be taken away from him. If in a proceeding by *A v. B*, C is given additional substantive rights over what he had before the proceeding took place, then some one else has been deprived of his rights without due process of law. It is difficult to read the opinion of the majority of the court, in *Merrill v. National Bank of Jacksonville*, without finding therein a statement either directly or by implication that the appointment of a receiver actually gives creditors some substantive equity or right or rights which they did not have at the time or before the receiver was appointed,⁷ or else that the appointment of a receiver has taken away from the defendant or certain creditors some substantive rights which they had before a receiver was appointed.

Judge Taft in *Chemical National Bank v. Armstrong*, referred to above, says:

"One must not fail to distinguish between the right of a creditor in personam against the debtor, and a right in rem against the assets."

A creditor, by the appointment of an equitable receiver, is certainly not deprived of his substantive right in personam against the insolvent, nor of his substantive rights against the property of the defendant. If he originally had a right in rem against certain assets of the insolvent, this or these rights are not divested by the

7. *Merrill v. National Bank of Jacksonville* (1893), 173 U. S. 131 at 136.

appointment of a receiver. Judge Taft, however, certainly cannot mean that the appointment of a receiver is a proceeding in rem, like a libel against a vessel, or like a libel against noxious or other food, by the government, or even a proceeding in bankruptcy, for a proceeding in bankruptcy is in the nature of a proceeding in rem, whereas a proceeding against an insolvent and the appointment of an equitable receiver is strictly and purely a proceeding in personam.⁸ The appointment of a receiver does not give a creditor any more right to proceed in rem against the assets of the insolvent than he had before appointment. In a proceeding in personam, property rights cannot be divested from the thing except by service on the present owner of the thing, either actual or constructive. In other words, in an equitable proceeding, rights cannot be created or divested or adjudicated, except the parties claiming such rights are in court. Although a lien holder before appointment has a right in rem against the thing, and although he may have a right in personam against the insolvent in addition to his right in rem against the thing, nevertheless the appointment of a receiver does not take away his rights in personam, neither does it give him in addition any lien or equity upon the general assets of the insolvent beyond what he had before appointment.⁹ Judge Taft in the same case says:

"The time when a man's interest is fixed and limited in property is when the act is done by which either the legal or equitable title is transferred to him. As we have seen, the time for fixing the amount of the claim so far as the stoppage of interest is concerned is the date of the declared insolvency. The same date, by a close analogy, must be taken as the date of stopping reduction of the claim by credits from collections on collateral. That is the time when the creditor is deprived of his usual remedy of suit, judgment and execution, and his equitable interest in the assets is substituted therefor. Upon that date each creditor becomes the owner for the purpose of securing his debt of that part of the assets of the bank which bears the same ratio to the whole property as the debt bears to the aggregate indebtedness. This interest in the assets remains fixed and constant until his debt is paid."

The idea has been, at least until recently, prevalent in American jurisprudence, that a simple unsecured creditor when he has filed his suit asking for the appointment of a receiver of an insolvent,

8. *Clark*, "Receivers," Vol. I, sec. 29.

9. Said V. Chancellor James in *re Albert Life Ass. Co.*, L. R. 9 Eq. 706 at 720: "It has been settled in these cases that there is no equitable charge on the assets. It is a mere debt. The moment the assets get into the hands of the official liquidator, there being no equitable charge on any part of the assets in favor of any particular person, it is a mere debt."

acquires an equitable lien on the assets by so doing.¹⁰ An examination of the cases, however, which allow such a lien, will generally disclose that in most of them the creditor bringing this suit has a judgment or something in the nature of a lien before he brings his creditor's suit. If this is so, such a lien is not affected by bringing the suit. Judge Noyes of the Circuit Court of Appeals of the Second Circuit says—¹¹

"However, the idea that a creditor's bill is an equitable levy equivalent to a general execution in favor of creditors who at the time it is filed are in a position to obtain execution or attachment, is an old theory which we believe has been exploded. The present extension of equitable jurisdiction over a corporation would be wholly unjustifiable if it were for the benefit of a particular class of creditors. Consequently, the time of the appointment of receiver constitutes no logical or necessary date for determining the provability of demands, and it should be fixed as equity, with due regard to convenience, may require."

Mr. Justice Holmes in *Wm. Filene's Sons Company v. Weed*, cites with approval Judge Noyes' opinion just quoted.

If it is true that a creditor, by bringing a suit in equity to have the insolvent's assets distributed, acquires by bringing such suit no lien or equity or charge upon the general assets of the insolvent beyond what he had before suit for receiver, it follows with greater force that an unsecured creditor or a secured creditor who is not a party to such a suit, acquires when some one else brings such suit no additional lien or charge against the general assets of the insolvent, beyond what he had before or at the time suit was commenced.

Mr. Chief Justice Fuller in *Merrill v. National Bank of Jacksonville*, touches upon the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. Our contention is, however, that in that case, although there were two funds, only one of them was as security, the creditor had no lien charge or equity on the general assets. Sir John Leach in *Greenwood v. Taylor*¹² refers to the doctrine when he says—"The mortgagee has two funds."

Our contention is that he may have one as security and although he may resort to the other fund he may have no right in re or ad

10. *Merrill v. National Bank of Jacksonville* (1898), 173 U. S. 131; *Chemical Nat. Bank v. Armstrong* (1893), 16 U. S. Appeals 565; *Miller's Appeal*, 35 Penn. St. 481; *People v. Am. Loan & Trust Co.* (1902), 172 N. Y. 371 at 378.

11. *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 721 at 740.

12. (1831) 1 Russ. & Myl. 185 at 187.

rem in the fund. This distinction is, we believe, fundamental, and is the crucial point on which we believe *Greenwood v. Taylor* was rightly decided and on which *Mason v. Boggs*¹³ and *Merrill v. National Bank of Jacksonville* were wrongly decided. The rule applicable to such a situation, is, we believe, the rule laid down and approved by Lord Hardwick in *Lanoy v. Atchol*,¹⁴ wherein he said—

“Is it not the constant equity of this court that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien.”

The principle has been recognized as fundamental from Lord Hardwick's day to now. Mr. Justice Story says—

“For by compelling A under such circumstances to take such satisfaction out of one of the funds, no injustice is done to him in point of security or payment; but it is the only way by which B can recover payment. A natural justice requires that one man should not be permitted from wantonness, or caprice, or rashness to do any injury to another.”¹⁵

An ordinary secured creditor has one security and a right against the insolvent by virtue of his contract which is not necessarily a security. He is not deprived of his security or of his right because the debtor dies or a receiver takes possession of his assets. He has a right before receiver appointed to a judgment for the full amount of his debt as then existing, and he has a right after receiver appointed to present his claim against the insolvent for the full amount of his then existing debt. But although a court of equity cannot and will not take away these rights, it already has taken away certain remedies and in offering the secured creditor other remedies it will require the creditor to abide by the usages and rules of equity which make for an equitable and ratable distribution of the assets in the hands of the court.

Mr. Chief Justice Fuller also said in *Merrill v. National Bank of Jacksonville*—

“The rule in bankruptcy went upon the principle of election; that is to say, the secured creditor ‘was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the court of bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy

13. *Mason v. Boggs*, 2 Myl. & Cr. 443.

14. (1742) 2 Atk. 446.

15. *Story*, “Equity Jur.” sec. 633.

his demand; but if he neglected to do this and proved for his whole debt, he was bound to give up his security': Robson, 'Law Bank.' 336. But it was only under bankrupt laws that such election could be compelled: *Taylor v. Thompson*, 5 Pet. 358, 369."

Such a statement must be answered if we are to maintain our stand for the bankruptcy rule of distribution in equitable receiverships of insolvent estates.

Can election be compelled except under the bankruptcy act? A creditor having a claim in personam for his debt and a lien or charge against certain property certainly can not be forced to give up his contracts and rights or change them by a court of equity which has appointed a receiver. The creditor as long as he is not guilty of fraudulent conduct may sit by and watch the receivership proceedings and may not be compelled to present his claim in personam or his lien or charge and he may not be compelled to elect between them. Furthermore, if he does sit by, he may not lose his claim in personam against the insolvent nor his lien or charge against certain assets. The receiver under proper orders of court may sell the property secured subject to the claimant's rights. The receiver may distribute the insolvent's general assets to other creditors in case this particular creditor has not presented any claim. However, all this does not take away the creditor's rights to the property secured, nor rights in personam against the insolvent. The claimant is not forced to exhaust his security, neither is he forced to participate in the general assets at all if he does not wish to share in the distribution. But if he wishes to participate in the distribution of general assets he must abide by the usages and rules of equity governing those assets. The secured creditor, as far as the general assets are concerned, has no lien charge or other equitable interest; he therefore must take, if anything, what the court can give him under an equitable and ratable division. The court can not say, you give up your security, or you give up your claim in personam, or even say you must realize your security and prove for the deficiency. But the court can say, you can only participate in the distribution of the general assets by complying with our conditions and doing equity. It is only equity that you first take satisfaction out of the fund in which the other creditors have no lien, then we will receive your claim for participation in the general funds. This is a principle of equity and is not confined to bankruptcy proceedings. After the creditor has exhausted his security, he is no longer a secured creditor and

it is only equitable that he should be placed upon the same basis as other unsecured creditors but on no better nor worse basis.

Judge Taft says in *Chemical National Bank v. Armstrong*—

“It is a rule of equity that where a creditor holds two securities, one of which he has in common with others, and the other of which he holds for his sole use, he may be required to collect his debt, first out of the security which he holds for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of this primary equity for the benefit of some one else who is less fortunate in his security.”

We agree with Judge Taft that a man holding two securities for one debt cannot be forced to give up these securities where he cannot pay himself in full out of one or both. However, in case of a mortgagee or other ordinary secured creditor asking to be paid out of the general funds of an insolvent estate, such mortgagee in fact only holds one security, namely—his mortgage. He has no more security in the general assets than has any unsecured creditor.

If the court of equity has not in its possession the mortgaged property, but the mortgagee himself has such property, and by reason of the contract pledge or mortgage, the mortgagee has a right to possession and ownership of such property, then the court of equity may say to the mortgagee you already in substance have this property and in substance have applied it, or ought to apply it towards payment of your debt; therefore your debt has been reduced by that amount. In either event, the actual net amount owing, due and payable to the mortgagee, when he either has the mortgaged property reduced to his possession, or has a right to have it reduced to his possession, is the total amount due less the actual or estimated value of the mortgaged property. No court of law will give judgment against the insolvent for the original sum due when in fact at the time judgment is rendered a less amount is actually due. If this is so, why should a court of equity approve of a claim for the full amount when in fact the full amount is not owing.

A more recent comment on the two rules is found in the case of *Westinghouse Electric & Manufacturing Co. v. R. Co.*¹⁶ Judge Dietrich in summing up a part of the argument made by Chief Justice Fuller and Judge Taft says—

16. (1915) 228 Fed. 972 at 978.

"In substance it is that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in their relation either to the estate or to each other; that but for the receivership the collateral holder would have had the right to sue and satisfy his debt by levy and execution against the entire property, regardless of his collateral, and that he cannot justly be deprived of that right to his disadvantage, and to the advantage of the unsecured creditor, by the institution of a receivership."

Judge Deitrich, however, allowed the secured creditor to prove only for the deficit after collecting his collaterals. Since the conclusions reached by Judge Dietrich are in accord with those of the writer of this article, it is needless to say we approve. Judge Dietrich showed that some of the arguments of those who stood for the chancery rule really led to the bankruptcy rule and yet a federal District Court could not, of course, overrule the Supreme Court of the United States. However, by hanging his case on to the Idaho statute, Judge Dietrich was able to order distribution as we believe equitably and ratably. The case of *Westinghouse Electric & Mfg. Co. v. R. Co.* was decided in 1915, the case of *Wm. Filene's Sons Co. v. Weed*, in 1917. In view of this latter case a serious question now presents itself, whether the Supreme Court as now constituted, could and would support the chancery rule when Mr. Justice Holmes has emphatically said that the supposed equity on which this chancery rule was based did not exist. If we eliminate this supposed equity because, as Mr. Justice Holmes says—

"We have no warrant for excluding creditors or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditor to accept,"

then we believe the able reasoning of Judge Taft and Mr. Chief Justice Fuller, and the other judges based on that premise must fall. In other words, these eminent judges tell us that the equitable interest which the secured creditor acquires in the general assets is fixed at the time of appointment of receiver; that being fixed this interest can not be taken away or decreased by subsequent events or payments. If, however, there is neither at law nor in equity any fixed interest or equity acquired by the secured creditor beyond what he had before receiver was appointed, then he has one security and a claim of debt against the debtor like any other unsecured creditor. Having such security he must exhaust that first before he can participate in distribution of the general assets against which others have claims.

THE ROMAN LAW ELEMENT IN THE SWISS CIVIL CODE OF 1912—II*

BY THOMAS R. ROBINSON

PART III

THE LAW OF INHERITANCE

FIRST DIVISION: HEIRS; THIRTEENTH TITLE: LEGAL HEIRS:
ARTICLES 457-466

The law of inheritance as contained in the Swiss code is, in broad outline and detail, Roman. That this is so from the first standpoint is apparent from the position of the Swiss heir in relation to his decedent. As, under the Roman system, the heir steps into the shoes of the decedent, he is liable for his debts and enjoys his property only as subsidiary to representation of the deceased. Again, there are two other features which mark the Swiss system as an offshoot of the Roman: these are the confusion of gifts *causa mortis* with legacies, and the elaborate scheme of statutory portions which it is obligatory to leave the various heirs.

For the other standpoint, namely, that embracing the detailed provisions, we must return to the examination of the various articles themselves.

Article 457 provides that a person's descendants shall be his next heirs, and that they are represented *per stirpes*.⁹⁴

The second class is the same also as at Roman law, namely, the ascendants; but the provision made in Article 458, that a deceased ascendant's descendants shall represent him *per stirpes* does not seem to be.⁹⁵

In Article 461 sections of the Code of Novels⁹⁶ are repeated, in so far as they limit the relationship of illegitimate children to the maternal side alone, should no recognition have taken place. There is, however, the limitation to one-half the share of a legitimate child in this article, which is not found at Roman law, apart from the '*illustis mulier*' of the Code.⁹⁷

*Continued from Vol. XV, 13.

94. This is the Roman rule: see Nov. 118, 1-4, and Inst. 3, 1, 6 and 16.

95. See *Mackeldey*, "Roman Law," § 675.

96. C. 6, 57, 56; C. 5, 5, 6; Nov. 12, 1; Nov. 74, 6; Nov. 89, 15.

97. C. 6, 57, 5.

Article 462, among its other provisions enacting that when there are no heirs of the grandparental stem (see the representation spoken of above, Article 458) the surviving spouse takes the whole estate, is strongly reminiscent of the Roman edict 'unde vir et uxor,' which proclaimed a like rule.⁹⁸

Article 466 providing that the canton takes, on the failure of all heirs, is also exactly the same as the enactment that the state be the heir to 'bona vacantia' introduced by the Roman 'lex Papia Poppæa.'⁹⁹

FOURTEENTH TITLE: DISPOSITIONS MORTIS CAUSA: ARTICLES 467-537

First Section: The Disposing Capacity. Article 467 gives power generally to every one of eighteen years of age and of sound mind to make a disposition causa mortis. That the age limit is higher than at Roman law, according to which a person who had merely attained his puberty was permitted to make a will,¹⁰⁰ may be taken as another indication of that new and independent development of the family property law noted above.

Second Section: Freedom of Disposition. Article 470 gives disposing power over all property save that embraced in the statutory portions. The same was of course true at Roman law.¹⁰¹

The provision contained in Article 471 as to the birthright portions is not the same as at Roman law; but that these portions are, in both systems, a definite part of the intestate share, is significant.¹⁰²

Article 474 contains the general Roman rule of how the disposable portion shall be reckoned, namely, by the value of the estate at death minus debts, as in the Digest.¹⁰³

In Article 477 it is enacted that when an heir entitled to a statutory share of an estate has injured its owner or violated the family duties incumbent upon him, he forfeits his portion, and it may be freely disposed of by the testator. The Roman rule was the same.¹⁰⁴

Third Section: Methods of Disposition. Article 483, laying down the general rule that an heir may be instituted for the whole

98. See Inst. 3, 9 (10), § 6; D. 38, 11; C. 6, 18.

99. See D. 38, 9, 2; C. 10, 10, 14.

100. See D. 34, 3, 20, § 1.

101. See Inst. 3, 7 (8), 1; Inst. 2, 18; D. 5, 2; C. 3, 28; Nov. 18, 1.

102. See Franke, "Swiss Civil Code," § 17; Glück, "Commentaries," Vol. 7, pp. 29-60, Vol. 35, p. 236.

103. D. 5, 2, 8, § 9; D. 50, 16, 39, § 1.

104. Nov. 115, 3, provides the cases in which unworthiness arose.

or a portion of an estate (of course after the statutory portions have been deducted), and Article 484, enabling the testator to give a legacy without instituting the legatee as his formal heir, both embody Roman doctrines.¹⁰⁵

In Article 486 there is a repetition of the rules of the Institutes and Digest,¹⁰⁶ which provide that should a legatee or heir receive anything under a condition, the condition may not be more onerous than the gift is beneficial. Thus I may not give \$5,000 to A under the condition that he will give B \$6,000, for there will be an abatement of the extra \$1,000.

Article 487 provides for the 'vulgaris substitutio' of the Roman law, which took place when a testator substitutes one heir for another in the event of the latter's death or incapacity,¹⁰⁷ and for 'substitutio fideicommissa,' where a legatee was substituted under the same circumstances.¹⁰⁸

Fourth Section: Testamentary Forms. In the general enumeration of the forms a will may take,¹⁰⁹ there is a substantial agreement with the provisions of the Roman law.¹¹⁰

In some other requirements, however, there is a difference between the two systems. Thus in Article 505 it is made necessary that the testator subscribe an holographic will, but at Roman law this was not required.¹¹¹

In Article 506 the nuncupative will is recognized, but at Swiss law it is only to be made when the other forms are impossible and a subsequently resulting possibility to use the other and more stable forms invalidates it. That a nuncupative will may be proved by two witnesses is, however, distinctly Roman.¹¹²

By Article 508 the nuncupative will of the Swiss code seems to give the attributes as noted in the last paragraph of the Roman will 'quasi militare.' The one point to be noted in this connection is, that the Roman will, last mentioned, and the Swiss nuncupative will are both classed as privileged and are both avoided by the ceasing of the conditions which make them possible.

105. See *Mackeldey*, "Roman Law," § 703 and notes.

106. Inst. 2, 24, 1; D. 29, 7, 15; D. 30, 114, 3; D. 32, 1, 6; D. 36, 1, 1 § 17, 17 § 2.

107. See Inst. 2, 15; D. 28, 6; C. 6, 25.

108. See D. 31, 50, pr.; C. 6, 51, 7.

109. Art. 498.

110. See for wills before a public official, C. 6, 23, 19; and *Mackeldey*, "Roman Law," § 691, for the private written and oral wills—citing *Donnellus*, "Comm. jur. civ.," lib. 6, c. 7-10.

111. See C. 6, 23, 20.

112. See *Mackeldey*, "Roman Law," § 694.

Articles 509-510 make provision for the modes by which a will may be revoked. Here, too, the Roman rules are the same.¹¹³

Fifth Section: Executors.

Sixth Section: Invalidity and Reduction of Dispositions.—Article 519, in providing that dispositions causa mortis are invalid when there was no capacity vested in the decedent to make them, is in harmony with the Roman law when the will creating them is void.¹¹⁴

The persons to bring the complaint being those who have an interest in the event, is the same rule as found in the Corpus Juris.¹¹⁵

In Article 528 it is enacted that when one is called upon to reckon the goods he has received from the testator as in the nature of an advancement or otherwise, they are only to be counted, when received in good faith, in so far as they have actually enriched him.¹¹⁶

Seventh Section: Claims Arising Out of Contracts of Inheritance. In this short section of three articles there is a significant provision. Although the 'Erblassvertrag' of German law seems not to be derived from Roman sources, yet here we find a suggestion which may link it with gifts causa mortis. This is in Article 534, which holds that property not delivered before death is not affected by these contracts, and in so doing reminds one of the same provisions in Code and Digest.¹¹⁷

SECOND DIVISION: SUCCESSION; FIFTEENTH TITLE: THE OPENING OF THE SUCCESSION: ARTICLES 537-550

In Article 540, enumerating the various grounds upon which an heir or legatee is to be held unworthy to take anything from the decedent, certain doctrines are exactly like those of Roman law. Thus anyone who has wilfully and illegally caused the death of the testator is barred,¹¹⁸ as are also those who have induced him, through fraud or duress, to change his dispositions in any way.¹¹⁹

113. For the Roman methods which correspond to those making a will, see Inst. 2, 21; D. 34, 4; and for revocation by a new will, 'translatio,' see D. 34, 4, 3, § 11.

114. See D. 28, 3, 1, 3, § 3.

115. See 'petitio hereditatis,' D. 5, 3, 1-3; D. 5, 3, 54, pr.

116. That the same was the Roman rule, see C. 3, 31, 1; D. 5, 3, 25 § 11, 40 § 1.

117. C. 8, 57, 4; D. 6, 2, 2, making delivery an essential element of a valid gift causa mortis.

118. See D. 34, 9, 3; D. 48, 20, 7 § 4.

119. See D. 29, 6, 1 pr., and § 2, 2 pr.

That a child still in embryo is protected by both Swiss and Roman law has been noted above, but the provision is repeated here specifically as to the right to inherit.¹²⁰

In the regulations imposed by Article 546, requiring security for the return of the estate of a person who has disappeared, there is nothing to make us change the position formerly taken, that at Swiss law there is no presumption of death. The limitation, however, which makes it unnecessary to continue the above security beyond a time when the supposed decedent would have reached his one-hundredth birthday, is the same standard as found at Roman law for the computation of the life of a servitude owned by a corporation.¹²¹

SIXTEENTH TITLE: THE EFFECTS OF SUCCESSION

First Section: Regulations for Security. In Article 553 provision is made for the taking of an inventory of the estate in three cases: (1) where there is a minor heir placed under a guardian or to be so placed; (2) if an heir is absent; and (3) if any of the heirs demand it.¹²²

Second Section: The Acquisition of the Inheritance. Article 560 is very important, for it describes the position of the Swiss heir as the representative of the deceased, whose debts become the heir's debts from the time of the death. As noted above, this feature of the Swiss law is one that marks it as of Roman origin more than any other one point of coincidence, and hence should be particularly mentioned.¹²³

That creditors of the decedent should have precedence over legatees is not surprising after the foregoing provisions as to the reckoning of the disposable portion of an estate. Still we find in Article 564 the matter specifically legislated upon.¹²⁴

The remaining provision of this paragraph is also markworthy, for it describes the effect of the unreserved acquisition of an inheritance to be exactly what it was at Roman law. Thus when the above set forth acquisition takes place, the heir's property and that of the decedent are regarded as one. The creditors of one are the

120. See *Mackeldey*, "Roman Law," p. 496, classifying 'posthumi sui' as equal to 'sui heredes.'

121. See D. 7, 1, 56; C. 1, 2, 23 pr., and § 1.

122. For the Roman rule covering (1), see C. 5, 51, 13, § 1.

123. For the same description of an heir's position, see D. 29, 2, 8, pr.; C. 6, 30, 10, 22, §§ 12 and 14.

124. Like passages in the *Corpus Juris* are D. 42, 8, 23; D. 39, 6, 17.

creditors of the other, and stand on an equal footing. In Roman law this was known as 'confusio bonorum defuncti et heredis.'¹²⁵

Article 566 gives the right to anyone, called as an heir, to renounce the inheritance. This method of protecting oneself against the liabilities attaching to an insolvent estate, was open at Roman law.¹²⁶

Article 567 limits the 'spatium deliberandi' at Swiss law to three months. Roman law gave a year or nine months generally.¹²⁷

Article 569 regulates the way in which the right to renounce shall be transmitted, in case the person on whom it first falls dies before the expiration of the time set. That in such a case the right descends to the heirs of the person so dying, is also true at Roman law.¹²⁸

Although the early Roman rule was that an heir who did nothing towards accepting an inheritance until after the 'spatium deliberandi' had elapsed was presumed to have refused the heirship, yet at the time of Justinian this was reversed and the presumption was that of acceptance.¹²⁹

Third Section: Public Inventory. That the beneficium inventarii should find its way into the Swiss code is not at all surprising. It was one of those later developments of the Roman law which had modified to such a great extent the iron logic of the older days and formed another way for the heir to protect himself from the disastrous consequences often resulting from his assumption of the decedent's legal personality. At Roman law an heir must demand this inventory within thirty days of the death of the decedent.¹³⁰

This inventory protected the heir's own property from the debts of the decedent, which must now be collected (if at all) out of the estate so officially listed, both at Roman law and under Article 590.¹³¹

Fourth Section: Official Liquidation.

Fifth Section: Action for the Inheritance. This section, Articles 598-600, gives to anyone who considers that he has a better claim to an inheritance than the present holder, a right of action, which in this particular and the end sought (namely, the possession

125. See D. 46, 3, 75, 95, § 2.

126. See Mackeldey, "Roman Law," § 741.

127. See C. 6, 30, 22, 13; D. 28, 8, 3-4.

128. See C. 6, 30, 19.

129. See C. 6, 30, 22, § 14.

130. See Mackeldey, "Roman Law," Art. 743, citing Nov. 1, 2, 1.

131. See D. 6, 30, 22.

of the inheritance) resembles the Roman 'Petitio hereditatis.' The two points of difference seem to be, however, that at Swiss law the period of limitation is one year, and no prescriptive title may be set up as a defense to such action.¹³²

SEVENTEENTH TITLE: DIVISION OF THE INHERITANCE

First Section: The Community Before Division.

Second Section: Method of Division. This section in providing for a division of the inheritance where several co-heirs come into it together is not Roman in detail.¹³³

Third Section: The Adjustment (of the Shares in a Division).

The Roman 'collatio' provides¹³⁴ exactly as does Article 626, that anything given the heir by the decedent during his lifetime shall be reckoned in as an advancement, even—and in this detail there is significance—where marriage portions have been given.

Fourth Section: Conclusion and Effect of the Division. Between heirs, parties to a division, Roman law provided that the relation, as to warranty, etc., be as if they were vendor and vendee.¹³⁵

PART IV

THE LAW OF THINGS

FIRST DIVISION: OWNERSHIP: EIGHTEENTH TITLE: GENERAL PROVISIONS: ARTICLES 641-654

Article 641 describes the general privileges of the owner of property, to use and dispose of it freely, subject only to the limitation imposed by law.¹³⁶

Fruits of a given principal thing form a component part thereof until severance.¹³⁷

132. For the Roman rule on these points, see C. 3, 31; D. 5, 3; Glück, "Commentaries," Vol. 7, §§ 562-571.

133. See Mackeldey, "Roman Law," § 749. But Roman law did, nevertheless, provide an action for a division (see Mackeldey above cited), which was practically the same as allowed by this section.

134. According to D. 37, 7, 9; C. 6, 20, 12, 16, 17, 19, 20.

135. See D. 10, 2, 25, § 1; C. 3, 36, 14; C. 3, 38, 7. Art. 637 contains the same rule.

136. The same concept of ownership was a part of Roman law: see Mackeldey, "Roman Law," § 294.

137. Art. 643; in D. 6, 1, 44 the exactly similar rule is to be found.

An appurtenance, according to Article 644, is a thing, by usual local opinion or the intention of the owner, a part of the main thing.¹³⁸ Another provision in this same article, namely, that a temporary severance does not rob an appurtenance of its character, is also Roman doctrine.¹³⁹

Again we find in § 166 of Mackeldey, the Roman rule expressed in relation to appurtenances as

"the general principle is that every disposition respecting the principal affects the appurtenances to it also, unless they are expressly excepted."

This is almost word for word like a passage in the Swiss article under consideration.

"If several persons have a thing in their joint ownership and without outward division or severance, they are co-owners; and each co-owner has in respect to his (ideal) share the rights and duties of an owner . . ."

is a quotation from the next article which arrests our attention. It defines the co-ownership of Swiss law, and creates the same institution as is found in the Digest.¹⁴⁰

Where common ownership exists, there must be a unanimous agreement of the co-owners before the whole property may be alienated or incumbered. The same rule was held at Roman law.¹⁴¹ A majority may decide, however, to adopt this or that course of management for the common property, which is broader than the similar provision of the Corpus Juris, by which a majority was absolutely powerless.¹⁴²

Article 650, providing that any co-owner may demand a division, is practically the same as in the Code.¹⁴³

Article 651, providing for a division by an action in court, gives what in substance was the Roman law remedy for the same conditions.¹⁴⁴

NINETEENTH TITLE: OWNERSHIP OF LAND: ARTICLES 655-712

First Section: Acquisition and Loss of Ownership in Land. In Article 660, which provides that shifting of soil from one piece of land to another works no change in boundaries and shall be gov-

138. This is the same as D. 19, 1, 13 (14); D. 33, 6, 3, § 1.

139. See D. 19, 1, 17, § 11; D. 30, 41, 12; D. 50, 16, 2, 42, § 4.

140. D. 10, 1, 4, pr., 7; D. 6, 1, 8; D. 45, 3, 5; D. 50, 16, 25, § 1.

141. D. 10, 3, 28.

142. C. 4, 52, 1, 4.

143. C. 4, 52, 3, which gives him the power to sell his share (when read in the light of Art. 646).

144. D. 10, 3, 1-2; D. 17, 2, 43.

erned by the rule regulating appurtenances, etc., we find a modification of the Roman doctrine of acquisition by alluvial accretions and an adoption of the rule as to avulsion. For, by Roman law, alluvial shiftings did, from their very nature, work a change of boundaries and land deposited by avulsion was only acquired when it had become a part of the receiving land—the Roman rule governing appurtenances.¹⁴⁵

Articles 661-662 contain the rules of positive prescription of the Swiss code. The parallel between the rules here laid down and those governing the Roman prescription is indeed noteworthy. To begin with, there is both an ordinary and extraordinary prescription provided for.

1. *Ordinary Prescription.* It will be remembered that for valid acquisition by this method, Roman law imposed the following conditions:

- A. The object must be 'res habilis' or something acquirable by ordinary prescription. There is no distinction of this kind at Swiss law.
- B. There must be 'justus titulus,' or a lawful acquisition sufficient to warrant the prescriptor in believing that he is the owner. At Swiss law, entry in the land records to constitute 'justus titulus' for land.
- C. There must be a sufficient period of time. Ten years *inter praesentes* was the Roman rule for immovables, which is adopted by the Swiss law.

2. *Extraordinary Prescription.* Whenever the above essentials, A or B, were wanting, thirty years was fixed at Roman law for the time. This also is the period of limitation made necessary by Swiss law when a title is not entered in the records.¹⁴⁶

Article 664 provides that things not capable of ownership or those with no owner shall belong to the state.¹⁴⁷

Second Section: Definition and Limitations of Ownership in Lands. In Article 667 those things which are appurtenant to land are enumerated. The rule does not seem to be exactly that of Roman law, which held that trees did not pass with the land, being in the nature of a crop.¹⁴⁸

145. See Inst. 2, 1, 20-21; D. 41, 7, § 1, 16, 56; C. 7, 41, 3.

146. On this whole subject see *Mackeldey*, "Roman Law," pp. 226-229.

147. D. 1, 8, 9.

148. See *Colquhoun*, "Civil Law," § 1665.

A common boundary marked with trees, stone, etc., is supposed to be the common property of the two adjacent owners, and each must do his part to preserve it intact.¹⁴⁹

Article 671, in enacting that when a building is put up on another's land or material is used in another's building, it becomes in both cases a component part of the land, is a repetition in detail of the Roman maxim, '*solo cedit quod solo inædificatur*.'¹⁵⁰

Again, in Article 674, the '*servitus projicendi et protegendi*' of the Digest¹⁵¹ exists when one's building may be so placed as to overhang the servient land.

In Article 678 a similar rule to that of Article 671 is laid down in reference to plants. The Roman doctrine is '*solo cedit quod solo implantatur*'.¹⁵² This would seem to contradict the statement of Colquhoun cited under Article 667,¹⁵³ but in view of the fact that some distinction may have been overlooked, it is not rejected but let remain for what it is worth.

When overreaching limbs and roots damage the property of another, they may be removed by the person injured and retained by him if the owner will not act. By this provision Article 689 reenacts the rule contained in the Digest.¹⁵⁴

In Articles 689-690 the Swiss law proclaims itself in accord with the Roman doctrine of surface water. This must be received from higher land by the owner of lower land, and he dare not protect himself against it to the injury of his neighbor.¹⁵⁵

TWENTIETH TITLE: MOVABLE PROPERTY: ARTICLES 713-729

Movable things are, according to Article 713, those capable of ownership, movable by nature, and the forces of nature which may be mastered and do not belong to land. This is substantially the Roman doctrine.¹⁵⁶

In Article 714 it is provided that transfer of possession is necessary to a valid transfer of ownership of movables. This was also the same as at Roman law.¹⁵⁷ But the Swiss provision that bona fides of the transferee will heal defects in the transferor's title so as

149. For the same Roman rule, see Inst. 2, 1, 31; D. 41, 1, 7, 13; D. 10, 3, 19; D. 17, 2, 83.

150. Inst. 2, 1, 29-30; D. 6, 1, 23, § 6; D. 10, 4, 6; D. 47, 3, 1-2.

151. D. 8, 3, 2; D. 50, 16, 242, § 2.

152. Inst. 2, 1, 31-32; D. 41, 1, 7, § 13, 9, pr.

153. Note 148, *supra*.

154. D. 43, 27 ('*de arboribus cædendis*').

155. D. 39, 3, 2, 18, §§ 1-2, 22, 23; D. 43, 13, 1, §§ 1, 7; D. 43, 20, 3, § 1; D. 43, 2, 1, § 11; D. 39, 3, 1, § 4; D. 8, 3, 17; C. 3, 35, 2; C. 3, 34, 4, 7.

156. See D. 50, 16, 93; D. 50, 16, 115.

157. C. 2, 3, 20.

to vest in the transferee a valid title, is not Roman.¹⁵⁸ This seems to be, in Swiss law, evidence of the movement resulting in the modern doctrines of negotiability, which seems to have been made necessary by the commercial activity of the later centuries.

'Quod nullius est, id ratione naturali occupanti conceditur'¹⁵⁹ is the burden of Article 714; and it thereby adopts the Roman institution of acquisition by occupancy.

Article 719 provides another example of Roman law adoption by enacting that captive animals become ownerless on regaining their freedom.¹⁶⁰ Domestic animals do not become ownerless except where they become wild again.¹⁶¹ The one point of difference is, however, that by Swiss law bees swarming on strange land are not lost to their owner, but at Roman law they were free to be taken by anyone who would.¹⁶²

Article 723 regulates treasure trove exactly as it was at Roman law by providing that if articles of value are found on another's land, under such circumstances that one may safely assume that it was buried or concealed for a long time, one-half goes to the finder and one-half to the owner of the land.¹⁶³

Article 726 defines specification as a means of acquiring ownership. At Roman law this was also recognized, but the crucial point seemed to be the intention operating at the time of specification rather than, as under this article, the relative importance of the raw material and finished product.¹⁶⁴

Article 727 provides that should movables of different owners become so mixed or joined that they cannot be separated, a co-ownership arises.¹⁶⁵ If one thing is so related as to be chief while the other is subsidiary, the joining or mingling vests ownership of the whole in the owner of the chief thing. This was also Roman law.¹⁶⁶ In both the above cases, Articles 726-727, where one acquires property of another, he must make just compensation therefor. The Roman rule was the same.¹⁶⁷

158. D. 50, 17, 54, which says that no one can give more than he himself possesses.

159. D. 41, 1, 3; Inst. 2, 1, §§ 12-18.

160. Inst. 2, 1, §§ 12, 15; D. 41, 1, 4, 5, § 5.

161. D. 41, 1, 5, § 6.

162. See *Colquhoun*, "Roman Law," § 967, citing Inst. 1, 2, 1, 15.

163. Inst. 2, 1, 39; D. 49, 14, 3, § 10; C. 10, 15.

164. See *Mackeldey*, "Roman Law," § 271.

165. Inst. 2, 1, 27; D. 41, 1, 7, §§ 8-9.

166. See *Mackeldey*, "Roman Law," p. 220.

167. See *Mackeldey*, "Roman Law," § 279.

Article 728, making the requisites for prescription of movables five years' time and bona fides, is in substantial accord with the Roman law, except the usual period was three years.¹⁶⁸

SECOND DIVISION: RESTRICTED REAL RIGHTS; TWENTY-FIRST TITLE

First Section: Land Servitudes and Charges on Land. Article 730, defining a servitude thus:

"A piece of land can be burdened in favor of another piece, in such a way that its owner must submit to certain encroachments by the owner of the other piece, or may not exercise his right of ownership within certain limitations in favor of the other owner. An obligation to perform acts can be joined to the servitude only incidentally."¹⁶⁹

is exactly the Roman conception of a servitude.¹⁷⁰

Article 734 provides that a servitude is extinguished by the destruction of the servient object. This was also Roman law.¹⁷¹ And Article 735, that should the dominant owner acquire the servient estate, the servitude may be extinguished, is also a Roman rule.¹⁷²

In Article 736 provision is made for the extinction of a servitude by judicial decrees, but the grounds are not the same as at Roman law.¹⁷³

Second Section: Usufruct and Other Servitudes. Article 745 describes usufruct as the right to use (not to consume) another's property, which is the same as the Roman usufruct.¹⁷⁴

Article 748 repeats the rule for usufruct contained in Article 734 for servitudes generally.¹⁷⁵

Article 749 provides that death of the usufructuary extinguishes the usufruct, a Roman rule also covered by the above citations; but that a usufruct of a corporation should be limited to one hundred years is distinctly Roman.¹⁷⁶

Article 752 makes it the duty of the usufructuary to answer for the neglectful loss or destruction of the property. This was the liability imposed also by Roman law.¹⁷⁷ But neither Swiss nor Ro-

168. See *Mackeldey*, "Roman Law," § 289.

169. English translation by *Shick*, Swiss Civil Code (1915).

170. See *Mackeldey*, "Roman Law," §§ 302 and 303, 2.

171. Inst. 2, 4, 3; D. 7, 4 (10 §§ 2-4, 12, 30, 31); D. 8, 2, 20, § 2; D. 7, 1, 2.

172. D. 8, 6, 1; D. 8, 2, 30.

173. See *Mackeldey*, "Roman Law," § 324 (but see also his § 315 as to 'causa perpetua' which may suggest this phase of the matter).

174. Inst. 2, 4, pr.; D. 7, 1, 1.

175. For Roman citations see that article.

176. D. 7, 1, 56.

177. D. 7, 9, 1, §§ 3, 7 and 2; D. 7, 1, 9, pr., 13, § 2, 15, § 3, 60, 65, pr.; Inst. 2, 1, 38.

man law makes it obligatory for him to restore that which is lost through reasonable use.¹⁷⁸

In Article 755 the rights of a usufructuary are set out, and they coincide with those allowed by Roman law.¹⁷⁹

By Article 756 the fruits of a thing subject to a usufruct, which ripen during its continuance, belong to the owner of the usufruct; but additions not in the nature of fruits belong to the owner of the thing. The Roman rule was the same.¹⁸⁰

Article 760 provided that security shall be given to the owner of the thing subject to a usufruct. Security seems to have been given at Roman law only in the case of a quasi usufruct.¹⁸¹

In Articles 776-778 the right to use another's house for personal occupation is described as being personal, inheritable—in other words, a true servitude—and is in these respects exactly like the Roman *habitatio*.¹⁸²

Article 779 makes possible the burdening of land 'with a servitude,' by which one, other than the owner, may build thereon. The right is transferable and may be inherited. In description it covers the Roman *superficies* exactly, which is, however, not a servitude strictly speaking, for it is not *prædial* or *personal*.¹⁸³

TWENTY-SECOND TITLE: LAND-PLEDGE

Third Section: Charges on Land. The Swiss law of land-pledge divides itself into the law of 'Grundpfand verschreibung' (entry in land records of a lien), 'Shuldbrief' (private instrument charging the debt on land), and 'Gult' (ground rent). Of these the first two are accessory to a valid claim against the debtor, and are for this reason more in accord with the Roman *hypotheca*¹⁸⁴ than with the English common law mortgage. But despite this general likeness, in theory the system of landed security seems one of those fields where Roman influence is most difficultly traced, and it will be only here and there that similarities can be found.

Thus we find in Article 800 that joint owners may pledge their shares in the common property.¹⁸⁵

Again, there is in Article 812 the rule which was held also at

178. D. 7, 9, 9, § 3.

179. D. 7, 1.

180. D. 7, 1, 27, pr.; D. 7, 1, 59, § 1; Inst. 2, 1, 36; D. 7, 4, 13; D. 33, 1, 8.

181. D. 7, 5, 7.

182. Inst. 2, 5; D. 7, 8; C. 3, 33.

183. See Mackeldey, "Roman Law," § 332.

184. D. 20, 1, 5, 22; C. 8, 33, 1, 2, and Schuster, "Civil Law," § 372.

185. C. 8, 21, 1; D. 20, 4, 3, § 2.

Rome and has found its way through the ecclesiastical courts into our own system, that between two equal incumbrances that prior in time is prior in law.¹⁸⁶

In Article 816 we have another striking provision which also throws light on our boasted equity doctrine, 'once a mortgage always a mortgage.' This is, that an agreement providing for a forfeiture of land pledged without the usual foreclosure proceedings is void. This is Roman law.¹⁸⁷ The other provision of this Article, giving the mortgagee the usual right to be paid out of the estate, is in accord with the Code.¹⁸⁸

Article 817 follows the doctrine of priorities in Article 812 to its logical conclusion, and provides that payment shall be made to creditors in the order of their rank, those of equal rank taking equally.

By Swiss law the mortgage security covered: 1st, the principal debt; 2nd, the costs of execution and interest for delay, and 3rd, three years' interest due at the time of institution of any bankruptcy proceedings, or of any foreclosure suit and interest from the last interest day. At Roman law the security extended to the first and second and to (what might be considered as the equivalent of the third) any conventional penalty.¹⁸⁹

Second Section: The Entry for Security Against Land. Article 836 provides for the creation of liens on land by operation of law. The same was the case at Roman law, but the grounds for their creation were not the same as those of the Swiss.¹⁹⁰

Third Section: Schuldbrief and Gult.

Fourth Section: Issue of Loan Certificates with Right of Pledge in Lands.

TWENTY-THIRD TITLE: PLEDGE OF MOVABLES

First Section: Pledge of Hand and Right of Retention. Possession is essential for a valid pledge, is the rule of Article 884. Roman law was not the same in this particular, except in its earliest period.¹⁹¹

186. D. 20, 4, 11, pr., § 1, 12, § 2; C. 8, 18, 8.

187. See Lex Commissoria, C. 8, 35, 3.

188. C. 8, 28, 6.

189. D. 19, 2, 51, 24, pr.; C. 4, 32, 4.

190. See Mackeldey, "Roman Law," §§ 343-344.

191. Inst. 4, 6, 7; D. 13, 7, 1.

Article 889 demonstrates the proposition set forth in the beginning of Title Twenty-two, that at Roman law the giving of security was purely an accessory and subsidiary thing to the existence of a valid debt, by providing that should a debt secured by pledge be paid, the pledge relationship ceases, and the pledgee comes at once under a duty to return the article.¹⁹²

Article 891 gives the pledge creditor the same right of sale and payment as was allowed the holder of landed security by Article 818; and as the Roman doctrines are embodied in the citations to the above article, it will be unnecessary to repeat them here.

Article 893 gives the same right of priority to prior pledges as was given in Article 817 to mortgages of different rank.¹⁹³

Article 894 is again a repetition of the forfeiture rule in relation to pledge as laid down for mortgages in Article 816.¹⁹⁴

Articles 895-898, as in the case of mortgages, provide for the creation of liens by operation of law; but here, as there, the grounds are not the same.¹⁹⁵

Second Section: Right of Pledge in Claims and Other Rights. Article 899 provides that choses in action may be made the subject of a pledge. The Roman rule allowed this also.¹⁹⁶

Third Section: Pawn Pledge.

Fourth Section: Certificates of Pledge.

THIRD DIVISION: POSSESSION AND LAND REGISTER TWENTY-FOURTH TITLE: POSSESSION

By Article 919 the Swiss law abandons the Roman distinction between detention and possession, by providing that whoever has the actual physical power over an article is its possessor. That this distinction should not have been adopted in modern law generally¹⁹⁷ seems to point to the fact that it is one of these parts of the Corpus Juris which was not fitted to survive the march of time. But again, in Article 920, providing for two classes of possession in the case of property given for security, the one of the owner, independent, the other of the pledgee, dependent, there would seem again a confusion

192. The same rule is found in D. 13, 7 (9, §§ 3-5, 13, pr.); D. 20, 6, 6; D. 46, 2, 18; C. 8, 31, 3.

193. See the Roman citations to Art. 812 for the same rule.

194. See the citations given in this paragraph.

195. See Art. 836.

196. D. 20, 1, 9, § 1 and C. 8, 17, 5; Glück, "Commentaries," Vol. 19, § 1091.

197. See Schuster, "Civil Law," § 311; D. 41, 2, 1, pr.

of possession with an idea of ownership and a departure from that concept of an actual dominion of the preceding article. And indeed this would point to the fact that the Swiss law bases the rule of Article 919, as does the Code Napoleon,¹⁹⁸ on a foundation of irrefutable presumption rather than one of strictly substantive enactment.¹⁹⁹

Then again, in Article 921, there seems to be a leaning to the Roman doctrine of 'corpus' and 'animus' in relation to possession, for it is provided that a mere temporary loss of dominion does not terminate possession. This was so at Roman law, according to which both act and intention must concur that possession should be acquired.²⁰⁰

Article 922 enacts that transfer of dominion over an article transfers possession. This was one of the ways provided at Roman law to accomplish the same end.²⁰¹

Still another Roman means of transferring possession is found in Article 923, which makes a transfer to the agent or nominee of the transferee valid.²⁰²

Again, in Article 924, we find another method provided. This is the Roman 'traditio brevi manu,' which took place where one in control of property under the title of another began to hold for himself and subject to no claim superior to his own.²⁰³

By Article 926 provision is made for the remedy of self-help when possession is threatened unlawfully. The same doctrine prevailed at Roman law.²⁰⁴ And by both systems the force allowed was to be limited to that sufficient to repel the threatened injury.²⁰⁵

Article 927, giving an action to recover lost possession, defensible by a plea of a better title (which was not possible at Roman law,²⁰⁶ and Article 928, allowing one to claim judicial protection when his possession is merely disturbed, provide in substance for the interdicts 'recuperandæ possessionis,'²⁰⁷ and the interdicts 'retinendæ possessionis,'²⁰⁸ respectively.

198. Art. 2230.

199. For the Roman doctrine on this see *Mackeldey*, "Roman Law," § 246 and citations.

200. D. 41, 2 (3, §§ 7, 13, 44, pr.); D. 43, 16, 1, 25.

201. See *Mackeldey*, "Roman Law," § 284, 1, 2, 3.

202. D. 41, 2, 42; D. 12, 1, 15; D. 24, 1, 3, 12; D. 41, 2, 1, 21; D. 6, 2, 11, pr.

203. D. 41, 1, 9, 5; Inst. 2, 1, 44; D. 12, 1, 9, 9; D. 41, 2, 3, 3.

204. D. 9, 2 (4, pr., 5, 45); D. 43, 16 (3, §§ 9, 17); C. 8, 4, 1; C. 9, 16, 4.

205. D. 9, 2, 5, pr.; C. 8, 4, 1.

206. See *Hunter*, "Roman Law," p. 359.

207. D. 43, 16, 1, §§ 3-6.

208. Inst. 4, 15, 4.

Articles 936 and 940 proclaim that in Swiss law the possessor in bad faith shall receive no protection; and in this respect there is an adoption of the Roman rule of persons in *pari delicto*.²⁰⁹

In Article 939 it is enacted that fruits consumed during possession not *bona fide* must be compensated for. The Roman rule was similar.²¹⁰

Article 941 provides for '*accessio possessionis*,'²¹¹ which give the right to add the possession of a former holder in reckoning the prescriptive period.

The remaining section of the Swiss code contains only local provisions of law, unaffected by Roman law influences.

209. D. 43, 16, 1, §§ 30, 40.

210. C. 3, 32, 22; Inst. 21, 36; D. 7, 1, 12, 5; D. 7, 4, 13.

211. Inst. 2, 6, 12-13; D. 44, 3; C. 1, 31.

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EDITORIAL NOTE

AMERICAN BAR ASSOCIATION MEETING.

The forty-third annual meeting of the American Bar Association, held in St. Louis in the week of August 23 was not notable for any single great accomplishment. The revised constitution adopted at the Boston meeting in 1919 so altered the Section of Legal Education that it will take two years for readjustment. The new Section of Criminal Law could do no more than organize. Even the Conference of Commissioners on Uniform State Laws, though as industrious as usual, was unable to report a completed bill.

But in the association's general meeting the programs were rather more interesting than usual, and with less oratorical inflation. The improvement in this respect suggests that more time for discus-

sion of practical questions may at any time be obtained by further restricting the time devoted to long-winded historical excursions.

The attendance was below the average, notwithstanding the central location of the city chosen, due probably to dread of excessive heat, and possibly to the lack of means for alleviating it. This fear proved to be unfounded. The weather was perfect. Hotel accommodations were excellent. A dozen clubs were opened to members, all of whom formed a favorable opinion of a very hospitable city.

The new president is William A. Blount of Pensacola, who has been president of the Conference of Commissioners on Uniform State Laws. The choice of Mr. Blount is a happy one for he possesses in generous measure the qualities of the ideal lawyer and deserves well of the association for loyal and efficient services.

Frederic E. Wadhams was re-elected treasurer and W. Thomas Kemp, secretary pro tem., became secretary. The new members of the Executive Committee are: John T. Richards of Illinois, John B. Corliss of Michigan, Hugh Henry Brown of Nevada, and H. O. Hart of Louisiana. The retiring members are T. A. Hammond of Georgia, U. S. G. Cherry of South Dakota, and Thaddeus Terry of New York.

President Hampton L. Carson in his address traced the evolution of constitutional government from its earliest beginnings. "The constitution is not a boulder of sandstone to be chipped and marred by the impatient chisels of overardent sciolists, but stands as a citadel of principles, a rock of defense in times of trouble, unshaken and sublime."

The association was honored by the presence of several foreign statesmen and lawyers, distinguished not merely by their offices but also by their personalities and attainments. Viscount Cave, a member of the Judicial Committee of the Privy Council, and Sir Auckland Geddes, British Ambassador, delivered brief addresses at the open meetings. Lord Cave and Capt. Albert L. Legrand, the latter a French lawyer, at one time attached to the American Expeditionary Forces as legal adviser, and Richard Bedford Bennett, K. C., of Alberta, vice president of the Canadian Bar Association, spoke at the annual dinner. Other speakers on the last evening were James Hamilton Lewis and T. J. O'Donnell.

Lord Cave, in his first address, dwelt upon infractions of international law in the war, taking the warrantable position that the war did not prove the law of nations to be impotent, but, on the contrary, established it more firmly than ever. Declaring himself a believer in

the League of Nations he recognized the need for avoiding subjects of a partisan nature and confined his emphasis to the world court formulated at The Hague in July as an organ of the League.

"Arbitral bodies created for the occasion are well enough, but they cannot be set up without the consent of both parties to a dispute and one of those parties may refuse. Further, the choice of the arbiter is sometimes determined not by individual fitness, but by someone's idea as to the line of least resistance. There can be no real and effectual international law until there is some standing tribunal composed of men of outstanding ability and judicial temper who have the confidence of the civilized world and are authorized on the application of any nation aggrieved to interpret and administer that law."

The distinguished jurist looks upon the proposed international court as one designed to discharge successfully the great function for which it is designed.

The British Ambassador is not a lawyer, but a scientist who taught anatomy before the war and at the time he received his appointment intended to be president of McGill University. Following President Carson's study of the origin of constitutional government, and his laudation of a particular constitution as unimprovable, Sir Auckland Geddes' remarks were not without a suspicion of drollery and reproof. He knows well the legal fetishes. His own faith in democracy—a word still used freely in the best circles in England—rests on no inspired document, but rather on a philosophy of science. Speaking of the theocratic state, he said:

"It is essential to grasp this Asiatic idea of the heaven-ruled state if we are to understand the ills of today, because it is the type of all the autocracies that have been. The hallmark by which you may recognize an autocracy is the idea that common men are made for the law—an idea not unknown among lawyers in democratic countries, but clearly theocratic in origin and, as we shall see, violently opposed to the democratic ideal."

If it were at all conceivable that an Englishman could have a sense of humor we might suspect that Sir Auckland was gently spoofing us.

Albert J. Beveridge delivered the Thursday evening oration. Under the title, "The Assault on American Fundamentals," he discussed recent invasions of the rights of freedom of speech and immunity from unlawful search and seizure. His address was well established in history and logic, but was too long, and lacking in the quality of interest which delighted his hearers at the Illinois State Bar Association meeting of 1920. The orator laid most emphasis on the need for free utterance as a mere safety valve.

THE OPEN FORUM

Usually the formal addresses have commanded the largest audiences and quite overshadowed the working sessions. But this year, the open forum, and the discussion of legal aid, appeared to interest members quite as much as the thunderous messages. The open forum was set for Wednesday afternoon. It represented a concession made by the Executive Committee to one of its members, Mr. Justice Thomas C. McClellan of Alabama. Judge McClellan apparently had two purposes, one being to afford an opportunity for the presentation of proposals and ideas which had not been canvassed and authorized by the Executive Committee, and the other to urge adoption of his proposed changes to the constitution and by-laws. These changes were published in the July number of the American Bar Association Journal. They provide for the election of members of the General Council by a mail ballot to be taken in each of the states.

The General Council is the peculiar intermediary between 12,000 members who profess undying allegiance to representative government and the thirteen members of the Executive Committee who possess all the power to rule and are entirely free from responsibility, for the General Council elects the officers and the other members of the Executive Committee. The election of officers, it is true, is in the form of a nomination, but for any member to attempt to defeat a nomination would be as grotesque as for a member of the Electoral College to vote for the candidate of another party. The United States Constitution presumes that he can, but in fact he cannot.

The General Council then would seem to be the heart of the association, but it is not. It is somewhat analagous to a grand jury which performs a limited function and then disperses without subsequent authority or responsibility.

The manner of selecting the members of the General Council is as humorous as anything in real life could be. Very few of the 12,000 members know how it is done, for only about three per cent ever participate. It is arranged that fifty caucuses, more or less, shall be held simultaneously in a single room. The members are permitted to rally around their respective state totems. It is impossible to be sure where one state group leaves off and another begins, in many instances, owing to lack of room. Several hundred are talking at once. Viva voce nominations are offered and voted and members standing five feet from the "chairman" are unable to hear.

It is not necessary to hold caucuses in the crowded and clamorous hall, and some states hold them in a private room in a hotel, transacting the business quietly and unanimously with a strictly limited attendance. Either way is objectionable. The open caucus and the viva voce voting effectually prevent deliberation and disfranchise members who do not attend the meeting, more than nine-tenths of the entire roll.

Judge McClellan spoke earnestly and at considerable length. His purpose was not so much to make officers responsible as to afford some tie between the association and its numerous members who are unable to attend meetings. He devoted some time to a general consideration of the association. With its 12,000 members it has come inevitably to represent the legal profession in the public mind. It has a great deal of machinery evolved for the purpose of discharging this conspicuous obligation. And yet its membership is less than ten per cent of the entire bar and only about five per cent of the members participate in any meeting. There are more registered usually, but the registration is swelled by members of the locality who have never attended any previous meeting and take no interest in the deliberative sessions.

The speaker declared that the association should not rest until it numbered 40,000 members, and then should go on till it reached 70,000, when its momentum would enable it to accept or reject all that yet remained outside. That it has made no appeal to many thousands of lawyers appears to be the most significant fact in the mind of Judge McClellan, who assumes without question that its destiny is to include every lawyer who is fit to associate with his colleagues. He attributes this lack of drawing power to the essential remoteness of a member from the powers and duties of the association. Annual participation in the election of the General Council, which will in turn elect the administrative officers, would help to make the stay-at-home member feel that he is an integral part with his due share of privilege and responsibility.

Judge McClellan's amendments received the support of several speakers and they drew out a number of interesting views and suggestions. Harry S. Mecartney of Chicago spoke for a central office and salaried secretariat. Gen. Nathan William MacChesney and Judge Clarence N. Goodwin supported Judge McClellan, and Patrick H. Martin of Green Bay, Wisconsin, went further, declaring that membership in the American Bar Association and the several state associations should be identical. He suggested that all members

of a state association might be accepted in the national organization in a body.

Interest in the solution of these problems of organization, which were only postponed and in no wise settled by the 1919 revision of the constitution was evidenced by the large number who remained through a very long session. But this was merely a safety valve. The Executive Committee found it safer to permit Judge McClellan to have his open forum than to refuse it. His proposed changes to the constitution were offered, were discussed, and came to nothing, for the Executive Committee possesses complete power to negative any resolution. It can even refuse to publish the report of a committee duly constituted and authorized by the membership, and avoid making any record of the refusal, so that the members will not know that a report has been tendered and stifled. It will cost a protesting member so much to inform the entire membership that protest is practically unworkable.

LEGAL AID SYMPOSIUM

The Friday morning discussion of the subject of legal aid proved to be thoroughly interesting to a large audience. Reginald Heber Smith, of Boston, author of the report on "Justice and the Poor" for the Carnegie Foundation, was the first speaker. He put the lawyer's duty to render assistance to the poor when in need of legal advice and assistance on a basis of fact and logic. It is due to Mr. Smith's investigations and report, more than to any other one thing, that this important topic has emerged to the consciousness of the organized bar. The entire session was in a way a remarkable tribute to a young man who has done a remarkable work.

Mr. Charles E. Hughes spoke on "Legal Aid Societies, Their Function and Necessity," speaking more particularly of the work of the Legal Aid Society of New York City, of which he is president. The address was a very interesting and convincing presentation of the subject, made the more timely and emphatic because of reliance upon the argument that legal aid is a necessary part of the work of "Americanization," concerning which so much has been heard of late. Ignorance of our language and of our institutions is often coupled with poverty in the cases of immigrants, who are thus doubly in need of protection in the courts. Unless some agency, public or private, intervenes to protect them from the wolves that prey on the weak, they will get a very undesirable impression of American government. Since we are at the present time abnormally sensitive to

the opinions and feelings of the submerged tenth, this is a good time to advance the claims of the legal aid societies.

The third speaker was Ernest L. Tustin, lately made head of the Public Welfare Department of the city of Philadelphia, which department includes legal aid as a municipal function. Mr. Tustin presented the advantages of the municipal legal aid bureau, which in Philadelphia's case is located in the city hall, close to the courts, so that the timid litigant is made to realize that government, in spite of its policemen and judges, is nevertheless human in streaks, and provides, next door to the rigors of justice, their proper antidote. Mr. Tustin's address was reinforced by some very entertaining and convincing anecdotes of the poor and ignorant who found faith in institutions after the legal aid bureau had saved them from impending ruin.

Judge Ben B. Lindsey, of Denver, under the title "Justice without Cost for Parent and Child" also related incidents in his long career as judge of a children's court. The success of informal procedure in juvenile cases is an old story, but Judge Lindsey opened a new vein in telling of his method of handling bastardy cases under chancery powers. The accustomed procedure in bastardy, as a quasi-criminal proceeding, punishes the woman more often than the man, as Judge Lindsey said. It certainly yields a minimum of relief. Under chancery powers the truth is got at quite readily and, according to this judge, it is not difficult to get substantial contributions from the defendant in nearly every case.

The use of chancery jurisdiction for this purpose has been discussed in Illinois, but rejected by a skeptical judiciary committee at Springfield. Since there is now a fund of experience to draw upon it should be easier to secure passage of a suitable measure.

At the conclusion of the symposium, a motion was adopted to print the four addresses separately and circulate copies among state and local bar associations. Except as action by local bar associations is aroused, little will come of such discussions. The individual lawyer cannot cope with the need for legal aid which exists in practically every locality. The only way that he can serve this need efficiently and without absurdly high cost to himself, is to contribute his share of the cost through his local association to the local legal aid society. Until this is done generally there will be room for the spread of seditious discontent and also a failure on the part of the bar to discharge an unescapable obligation and to participate in a salutary duty.

THE CONFERENCE OF DELEGATES

The Conference of Delegates was attended by ninety-nine delegates representing thirty-five state and thirty-two local associations. The three sessions on Tuesday were well attended. The Committee to Prepare a Brief on the Practice of the Law by Corporations made a report of a most thorough character, covering the entire field of unlawful practice. This report will be of value for reference in all states.

The Committee on State Bar Organization reported through its chairman, Clarence N. Goodwin. The report is based on the belief that the bar will regain high standing only when it shall have acquired means for self-government and self-discipline, and that this depends upon an inclusive organization. The misconduct of a few lawyers tends to bring the entire profession into disrepute. Limited organization, such as is now common in the various states, does not afford a sufficient fulcrum for the enforcement of rules of ethics. The report discusses the objections and difficulties of the situation. The bar in every state is already per se a body politic, subject to the rules of the Supreme Court, and in some states to any special enactments of the legislative branch. What is lacking at this time is legal machinery through which the bar may function.

"Your committee is, therefore, of the opinion that what is necessary and practical is not a legislative declaration transforming the present voluntary bar association into a corporation created by special statute, but a legislative act providing for the organization and functioning of the existing State Supreme Court Bar.

"Your committee approves of a great deal of the substance of the Bar Association Act discussed at the last meeting of the Conference of Delegates, and feels that much of it could be placed with little change in an act for the organization and government of a State Supreme Court Bar. Such an act would properly provide for a body of public officials to be known by some such title as the Governors of the Supreme Court Bar; it would define their duties and powers, provide for their selection by the entire bar, require the payment by the practicing lawyers of an annual license fee into the State Treasury, or to the Treasurer of the Board of Governors, and empower the Board of Governors to disburse the fund for the purposes designated. Annual and special meetings of the entire bar could be provided for and in general the means would be supplied which would enable the entire bar to function as a body politic and become responsible for the competence, the character and the good behavior of those judicial officers of the court who would constitute its membership. No legal difficulty in the way of such an organization has occurred to the committee, and it believes that no practical legal difficulty exists.

"We call the attention of the conference to the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility."

The report tells of encouraging progress in the past year, for the associations in a number of states have either authorized the drafting of acts or the creation of special committees on this subject. It sums up in these words:

(1) The act should not be an attempt to transform a voluntary organization into a body politic, but it should, rather, be a legislative recognition of the fact that the entire existing bar of the state, being in its nature a body composed of public officials, constituting an integral part of the judicial department, is inherently a body politic and the act should so declare it to be.

(2) It should provide a governing body selected by the entire bar, which should have powers of discipline and admission subject to review and final control, for the present at least, by the Supreme Court of the State.

(3) The members should be given an opportunity to express themselves officially on all questions touching the welfare of the bar and the better administration of justice.

(4) The provisions of the act should be such as to give the members of the bar the fullest and most untrammelled means of expressing their choice in the selection of the governing body; and in this way every member of the bar should be made to feel that he is a responsible part of the officially organized bar of the state and has duties and obligations growing out of that relation.

"In this connection we suggest that, as man is a social being, he is influenced largely by the general opinion of those with whom he is associated; consequently when he is made a part of an officially organized public body, in the government of which he has a share, he normally is affected by its esprit de corps, and as a part of it feels an obligation to sustain its highest traditions.

"Within the last few years we have seen millions of young men give an inspiring example of the effect of membership in an organization having great purposes and traditions. The most potent cause of unethical conduct in our profession is that the young lawyer does not become a part of an officially organized bar, and in the ordinary case does not even become a part of a voluntary professional organization. He remains isolated without anything to make him conscious of his relation to the bar as a whole, without being brought in contact with its great traditions, and without anyone authorized by law to advise him with reference to his duties."

The Conference discussed the following three questions, a delegate from every state taking the floor on each question:

1. What are state and local bar associations doing to impress upon the people of their states and communities the vital importance of respect for the law?
2. How can the influence of such associations in that field be increased?
3. What are the state and local bar associations doing to promote knowledge and understanding on the part of the people of their states and communities of the fundamental principles of American institutions?

One of the important matters taken up by the Conference was the proposal that it become a section of the American Bar Association. This was done after a joint conference between the Executive Committee and representatives of the Conference, on the basis of a definite schedule of by-laws. The Conference thus places itself in a position to receive from the parent organization annual appropriations sufficient to meet its modest needs, but it does not surrender any of its autonomy as a congress representing local bar associations.

The following were elected officers: chairman, Stiles W. Burr of St. Paul; vice chairman, Clarence N. Goodwin of Chicago; secretary, Julius Henry Cohen of New York; treasurer, Nathan William MacChesney of Chicago; executive committee: Elihu Root, Moorefield Storey, Charles A. Boston, W. H. H. Piatt, Thomas W. Shelton, Thomas J. O'Donnell, W. V. Rooker, and W. T. A. Fitzgerald.

LEGAL EDUCATION

The Section of Legal Education adopted by-laws which provide for a council of eight members in addition to the usual officers. The election resulted as follows: chairman, Elihu Root; vice chairman, Charles A. Boston; secretary John B. Sanborn; council members: Oscar Hallam of St. Paul, Charles M. Hepburn of Bloomington, Ind., Robert M. Hughes of Norfolk, Va., Edward H. Letchworth of New York City, James P. McBaine of Columbia, Mo., Judge Julian W. Mack of New York City, Frederic Woodward of Chicago, and Harlan F. Stone of New York City.

Professor Hepburn presided and read a paper which reviewed the relation of the American Bar Association to legal education over a period of forty years. He arrived at the conclusion that there was little progress to be noted in the past twenty or twenty-five years.

Judge Andrew Bruce of Minnesota followed with a sharp criticism of legal education and a powerful plea for progress. The speaker observes a vast chasm between law and government as known to the lawyer and jurist, and law and government as known to the rest of mankind. Students of sociology and civics, he said, create more unrest than progress. There should be extension courses in constitutional law, criminal law, legislation, and similar branches,

to radiate from the law schools an influence which is needed and can be derived from no other source. At the same time the law curriculum should be expanded to include social and civic branches. In this way legal education may be related to the living problems of a living age.

Judge Bruce even had the daring to attack the judicial primary. There is room for hope when our most fervent defenders of national institutions do not try to conceal defects. The address in question deserves wide publication if it is to accomplish its full worth, for an audience of law school teachers is by no means an ideal one to receive suggestions concerning expansion of the curriculum or any pragmatic relation to civic problems.

The by-laws of the section require the council to investigate the entire subject of legal education and make a report as to what course is needed to bring about reform. In plain language, the purpose is to show up the proprietary law schools which have slight facilities for teaching law and exist for the benefit of their owners rather than for the good of the students or the public. In no other profession have requirements been so slack in recent years. Law teaching is over-due for a cleaning up. But the work is unpleasant. Apparently afraid that the council would not do its full duty in the premises a motion was offered by William Draper Lewis to create a special committee to do what the by-laws require of the council. Action was deferred until the last session and then the resolution was modified so that it merely directs the council to investigate and report.

SECTION OF CRIMINAL LAW

The Section of Criminal Law is a new one. It will not supplant nor compete with the American Institute of Criminal Law and Criminology, but will co-operate. This is a field of work toward which the American Bar has turned its back too long. A great deal of constructive work is overdue, nor is this work of the abstract kind which so many appear to consider it. We have got pretty well through the stage of theory; now we need concrete legislation.

Resolutions in the nature of a declaration of principles were adopted by the new section, committing it to three lines of highly practical work, namely: the field of substantive criminal law, the field of procedural criminal law, and administration of justice in the criminal courts. It was also resolved to create committees on the first two subjects, and to co-operate with the American Institute of Criminal Law and its allied associations, thus linking the section with criminological work which is broader and more scientific than a lawyers' section should be expected to be.

The section adopted with slight change the uniform by-laws for sections, and elected the following officers: chairman, Ira E. Robinson of West Virginia; secretary-treasurer, Edwin M. Abbott of Philadelphia; council members: John G. Buchanan of Pennsylvania, W. H. Washington of Nashville, Lawrence McDaniel of St. Louis, Dr. Roscoe Pound of Cambridge, Frederic B. Crossley of Chicago, and Earl C. Arnold of Cincinnati.

OTHER SECTIONS AND ALLIED BODIES

The Judicial Section was not obliged to organize under the new constitution. At its annual dinner Viscount Cave was guest of honor and a speaker. Mr. Justice Dunn of the Illinois Supreme Court was one of three speakers at the afternoon session. Charles A. Woods, United States Circuit Judge of the Fourth Circuit, South Carolina, was re-elected chairman.

The legal problems of South American trade were considered by Mr. Phanor J. Eder, of New York, in an address to the Section of Comparative Law. William W. Smithers, of Philadelphia, presided and was elected chairman for the next year.

At a meeting of the Section on Patent Trade-mark and Copyright Law, Chairman Wallace R. Lane advocated a much-needed increase in the force, salaries and equipment of the Patent Office. His recommendation that the association indorse the Nolan bill, calling for an increase, was adopted. Another suggestion, that it is the sense of the Section that it is unnecessary and inexpedient to pass on any legislation concerning compensation for the infringement of patents, was also adopted. Amasa G. Paul of Minneapolis was elected chairman.

The Section of Public Utility Law heard a memorial address for William C. Niblack, of Chicago, late chairman, by Stephen S. Gregory. Bentley W. Warren, of Massachusetts, who was elected chairman, delivered the principal address.

The National Association of Attorneys General received an address by James E. Markham, Assistant Attorney General of Minnesota on "The Argument in Decision," which caused considerable discussion. The criticism of the courts of review and the pleas for brevity in opinion writing suggest that this association should hold a joint meeting every year with the Judicial Section.

The Association of American Law Schools met again with the American Bar Association for the first time in several years. Its programme was a slim one. Nathan Isaacs of Cincinnati read a paper on "The Aftermath of Codification." The Committee on Reform of Judicial Procedure recommended that courses in modern proced-

ural methods be required of all candidates for degrees, and asked for permission to compile a source book for such courses. Action was postponed until the mid-winter meeting of the association.

The Conference of Commissioners on Uniform State Laws had no completed bill to report. However, progress was reported on several measures. A very timely and important task has been undertaken in relation to the law of aviation.

REPORTS OF COMMITTEES

The Committee on Uniform Judicial Procedure is found in its accustomed position of asking members to urge the Senate Judiciary Committee to pass the American Bar Association bill to direct the United States Supreme Court to formulate rules of procedure for actions at law in United States courts. Only one member of the committee, Senator Walsh, is opposed to the idea, but he appears to block progress and the will of his colleagues and the American Bar Association with the greatest ease. The best that can be said is that we are one year nearer to the passage of this bill than when Mr. Shelton's valiant committee reported last year.

The Committee on Classification and Restatement of the Law secured passage of a resolution directing it to take such steps as may be deemed necessary and expedient, in conjunction with the Executive Committee, to co-operate with any body which has for its purpose the carrying on of the proposed work of classification and restatement of the law. The discussion disclosed some fantastic notions as to what classification and restatement signify. Some members were prepared to resist if it should mean abandoning the common law, while one member, who had heard about the Louisiana code, and who considered the Louisiana Purchase the greatest bargain ever consummated by an American lawyer, said he thought a liberal blending of Roman law would not hurt and might be beneficial. The resolution evidently implies that an effort will now be made to organize the American Academy of Jurisprudence, which got as far in 1913 as a list of names.

The Committee on Professional Ethics and Grievances submitted a formidable report of fifty-one pages. An attempt was made to get facts from every state concerning canons of ethics and machinery for disciplining offenders. Scattered facts were gleaned which are interesting and significant, if only because there appears to be so little of real fact to be got. The committee has undertaken a great work which must inevitably lead to constructive efforts. In fact it has already led to endorsement of the idea that bar associa-

tions should become strong enough in membership to acquire and use powers of discipline.

The Committee on Jurisprudence and Law Reform succeeded in winning approval for two measures—one a bill to enable the federal government to enforce treaty obligations, and the other an amendment to the Judicial Code conferring the power to make declaratory judgments. The first would make any criminal offense against the person or property of an alien an offense also against the United States, punishable in its courts. This legislation has been greatly needed for many decades. Failure to secure it illustrates well the local character of our federal government and the difficulty of securing passage of legislation which benefits no special interest.

The Committee on International Law presented an interesting and valuable table of events and international conventions. It avoids disagreement by reciting merely facts. Most emphasis is laid upon the organization of the judicial branch of the League of Nations, in which work Elihu Root's participation prevented his attendance at St. Louis.

THE NEW ASSOCIATION JOURNAL

Probably no single thing provoked more comment during the week than the appearance of the association Journal in its new monthly format. Doubtless most members had not heard of the plan which resulted from collaboration between the editorial and the executive committees. The September number appears to have been issued as a sample in order to obtain a reaction.

The editors succeeded in getting the reaction.

The writer is of the opinion that it is very important to expand the Journal and publish it monthly. An acceptable policy with respect to inclusions and exclusions is something to be worked out gradually. A change in a periodical always causes dismay; it is as if somebody had painted the old homestead red. There will always be plenty of material available for the Journal in its enlarged form, so that exclusion will be the greater part of editing. Something will be made of the Journal if a little patience is extended, for there are many hundreds of willing critics. On one point there is already reassuring concurrence—that the new Journal should not encroach upon the field already quite acceptably filled by existing law reviews. And it should therefore please everybody to note that it begins by avoiding wasteful duplication; it selects an entirely new path; no other law journal ever published has traveled quite this same path; none other is ever likely to select it. We witness for once a unique achievement.

H. H.

COMMENT ON RECENT CASES

TORTS—DEFAMATION—LIABILITY FOR REPETITION BY THIRD PERSONS.—The doctrine of *Hastings v. Stetson*, 126 Mass. 329, never did commend itself to us, and we are glad to note that a judge has arisen to put upon record a condemnation of its unfairness, even though his opinion is but an unsuccessful dissent.

That doctrine is that, as matter of law, the author of a defamation is not responsible for damage done through its repetition by third persons unauthorized by him for the purpose, even though such repetition was on the facts a natural and probable consequence of his original publication. The doctrine is now adopted in the eighth federal circuit, in *Maytos v. Cummings*, 260 Fed. 74, Stone, J., dissenting. The case was a plain one to bring out the unfairness of the doctrine. The plaintiff was the assistant general manager of a railroad, the defendant was its president. The latter on three occasions stated to seven different persons: "There has been a systematic steal of coal at the terminals, and the coal in these cars has been stolen by Cummins." This statement was soon repeated and spread all over the town, as having come from the defendant. The plaintiff's credit was ruined, and he sought employment in vain. The jury found the statements to be false.

The doctrine which confines the plaintiff's recovery to the damage caused only by the defendant's own utterances makes an exception to the general rule for the liability of the author of an act. That general rule holds him liable for such consequences as naturally and probably flowed from the act. This doctrine exempts him, as matter of law, from such consequences in the specific case of a repeated defamation.

What is there in the situation of a defamer that entitles him to an exceptional exemption not accorded to the brick-thrower and the pistol-user? Why should a defamer have it made easier for him than it is for other persons who originate trouble for the innocent? "A lie once set going," says our shrewd and beloved Thackeray—

"having the breath of life breathed into it by the father of lying, and ordered to run its diabolical little course, lives with a prodigious vitality. How comes it that the evil which men say spreads so widely and lasts so long, whilst our good kind words don't seem somehow to take root and bear blossom? Scandal is good brisk talk, whereas praise of one's neighbor is by no means lively hearing. An acquaintance grilled, scored, devilled, and served with mustard and cayenne pepper, excites the appetite; whereas a slice of cold friend with currant jelly is but a sickly, unrelishing meat."

We refer to Mr. Justice Stone's dissenting opinion for a sufficient vindication of the view that *Hastings v. Stetson* represents an anomalous and unjust doctrine. How it originated historically,

would take us too far afield. A discussion of it will be found in Professor Jeremiah Smith's article on "Liability for Negligent Language" (Harvard Law Review, XIV, 184). Other recent decisions are these: *Howe v. Bradstreet Co.*, 135 Ga. 564, 69 S. E. 1082; *Mills v. Flynn*, 157 Ia. 477, 137 N. W. 1082 (doubting the propriety of the *Hastings v. Stetson* rule); *Age-Herald Publishing Co. v. Waterman*, Ala. 66 So. 16. A note commenting on recent authorities will be found in Columbia Law Review, XVI, 505.

J. H. W.

LEASES—KNOWLEDGE OF LESSEE'S INTENT TO USE THE PREMISES ILLEGALLY—PAROL EVIDENCE THAT LANDLORD'S AGENT AND LESSEE MADE THE LEASE WITH THE UNDERSTANDING THAT THE SUNDAY CLOSING LAW WAS TO BE VIOLATED.—In *Hoefeld v. Ozelle*, 290 Ill. 147, 125 N. E. 5, the Supreme Court had to determine the validity of a lease of premises in Chicago for a restaurant and saloon where the lessee covenanted in the lease to observe the laws of the state and the ordinances of the city, but was allowed to terminate the lease on sixty days' written notice given within thirty days after the closing of the saloon by the state or city authorities "in the event that the state Sunday closing law is generally enforced in Chicago or in the event that the city of Chicago shall discontinue the issuance of all saloon licenses." The lessee did not attempt to terminate the lease, but resisted recovery of the rent on the ground that the lease was in contemplation of the violation of the Sunday closing law and accordingly was illegal, and in support of that contention offered to prove that at and prior to the execution of the lease the agent of the landlord and the lessee conversed with reference to the lease being made with the understanding that the Sunday closing law was to be violated. The trial court rejected the offered evidence and entered judgment in favor of the landlord. The Supreme Court affirmed the judgment on the following grounds: (1) The lease specifically provided that the lessee should observe the law, so on its face the lease was legal; (2) Mere knowledge that a lessee intends to use the demised premises in violation of the law will not make the lease illegal in the absence of the landlord's participation in the purpose, and hence the mere knowledge that the lessee would keep open on Sunday if the police permitted did not make the lease illegal; (3) The lessee did not establish in a proper way the authority of the landlord's agent to enter into any agreement not contained in the written lease; and (4) The testimony as to conversations between the landlord's agent and the lessee "tended to vary or add to the plain terms of the lease between the parties."

The question of when mere knowledge that the other party to a contract or a lease is intending to use the personal property or the premises acquired thereby in violation of the law necessitates a denial of legal relief to the owner against the wrongdoer is troublesome, because so much depends upon one's attitude toward the offense contemplated. If the offense is only sufficiently grave,

"mere knowledge" will make the owner an accessory before the fact with criminal liability. The Illinois Supreme Court evidently thought that a violation of the Sunday closing law, when that violation was countenanced by the local police officers, was not a serious thing and that, accordingly, a landlord who knew when the lease was executed that the lessee contemplated violating the law with police permission, but was himself indifferent, was not to be denied recovery of his rent. That is arguable, of course, but many courts would approve. But the lessee offered evidence to show that the landlord's agent, at least, was not indifferent, and one may hazard the guess that the reason was that a violator of the Sunday closing law would be expected to pay more rent than one who observed the law. However that may be, the lessee offered to prove an oral understanding between the landlord's agent and the lessee "at and prior to the execution of the lease" that the Sunday closing law should be violated, so the case does not present the aspect of "mere knowledge" of the lessee's illegal intent and indifference on the landlord's part. To be sure, the Supreme Court does say that the authority of the agent to make such an illegal arrangement for the landlord was not properly proved, and had the decision as to the rejection of the offered evidence been rested wholly on that ground no special harm would have been done, but unfortunately the court gave as an added reason that "the offered testimony tended to vary or add to the plain terms of the lease between the parties." Such a reason is indefensible. Very few courts have been willing to say that if the parties to an illegal contract are only clever enough to put their contract in an apparently legal form they can enforce it. The overwhelming weight of authority is the other way. See 16 Ann. Cas. 388; Ann. Cas. 1917 D. 426. In an early Kentucky case on champerty, the court said—

"No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law. It would only be necessary for the parties, as is alleged in the case before the court, to have a secret, illegal understanding, and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasions." Ewing, J., in *Wilhite v. Roberts*, 4 Dana (Ky.) 172, 175.

As Vickers, J., puts it in the usury case of *Clemens v. Crane*, 234 Ill. 215, 230, 84 N. E. 884, 889, "The character of a transaction is not to be judged by the mere verbal raiment in which the parties have clothed it, but by its true character as disclosed by the whole evidence." See *Kidder v. Vandersloot*, 114 Ill. 133; cf. *Wolf v. Fletemeyer*, 83 Ill. 418. As was said by Shepard, J., in the lease case of *Ryan v. Potwin*, 60 Ill. App. 637, 638: "It is unquestionable that a contract, sealed or unsealed, though on its

face honest and lawful, may nevertheless be shown to be illegal and contrary to public morals"; and it certainly is unfortunate to have the Supreme Court saying now for the first time anything to the contrary. G. P. C., Jr.

ILLEGITIMATES—"CHILD" AS USED IN WORKMEN'S COMPENSATION ACT.—In the recent case of *Murrell v. Industrial Commission*, 291 Ill. 334, 126 N. E. 189, the Supreme Court held that an illegitimate offspring of a man was not his "child" within the interpretation of that term as it appears in connection with the right of compensation by claimants under the Illinois Workmen's Compensation Act. The query at once occurs: Suppose a mother had been killed in the course of employment, leaving an illegitimate child to whose support and maintenance she had in fact contributed during her life, under circumstances where, had the child been legitimate, no question could be raised as to its right to compensation as a "child" of the mother?

It is submitted that the court would hold such child entitled to compensation, on the authority of *Smith v. Garber*, 286 Ill. 67, within the rule in that case that the statute makes such illegitimate the "child" as well as the "heir" of the mother. That position seems strengthened by the case of *Morrow v. Morrow*, 289 Ill. 138, where the court held that the illegitimate was entitled to inherit from a half-sister, even though the mother was living.

It seems that the proper construction of the statute amounts simply to this: that the statute recognizes the natural relationship so far as the mother is concerned. Indeed, a line of authorities recognize a duty in the mother to support the child, although based upon a theory of de facto guardianship (*Peterson v. Dana*, 12 Mass. 429; *Somerset v. Dighton*, 12 Mass. 383; *Wright v. Wright*, 2 Mass. 109; *Hudson v. Hills*, 8 N. H. 417; *Friesner v. Symonds*, 46 N. J. Eq. 521; *Nine v. Starr*, 8 Oreg. 49; *Poggenburg v. Conriff*, 23 Ky. L. Rep. 2463; *People v. Green*, 124 P. 871 (Cal.); *Beckett v. State*, 4 Ind. App. 536; *State v. Hausewedell*, 94 Minn. 177; *State v. Nestovall*, 72 Minn. 415; *Ill. Cent. R. Co. v. Sanders*, 104 Miss. 257). The same obligation, however, does not rest upon the father (*Summons v. Bull*, 21 Ala. 501; *Glidden v. Nelson*, 15 Ill. App. 297; *Marlett v. Wilson*, 30 Ind. 240; *Moore v. Boughman*, 7 Ohio N. P. 149). This distinction obtains because the identity of the mother is never in dispute, which is not true as to that of the father (*Matter of Doyle*, Clark (N. Y.) 154, 156). Whence results the doctrine that the custody of the child is in the mother until the child can choose for himself: *Matter of Doyle*, Clark (N. Y.) 154, 156; *Lipsev v. Battle*, 80 Ark. 287, 289, the latter case suggesting that the rule is founded on natural love and affection.

It is not likely that the situation will soon arise in the Illinois courts, but it would seem, when it does, the action of the court is plainly forecast by the trend of the authorities thus noted.

E. M. L.

WILLS—REVOCATION.—It is not every will which is revoked by marriage. In *Ford v. Greenawalt*, 292 Ill. 124, 126 N. E. 555, the Illinois Supreme Court had occasion to pass upon a will expressly providing for the disposition of the testator's property in the event of his contemplated marriage, and held that under these circumstances the will was not revoked. This was a new question which had not previously been passed upon by our court.

It is interesting to compare this decision of the court with its opinion and reasoning in the case of *Limbach v. Limbach*, 290 Ill. 294 (commented upon in a note in ILLINOIS LAW REVIEW, XV, 47). Both opinions are by Justice Cartwright. In the *Limbach* case the court felt constrained to apply our statute literally and held that a will could no longer be revoked by implication in view of the statute that a revoking will must be one "declaring the same." In the instant case the language of the statute before the court was even more emphatic, stating positively that "a marriage shall be deemed a revocation of a prior will." The court, however, considered the history of this enactment and the reason for the rule in question, and decided the will was not revoked. The common law doctrine that a will was revoked by marriage and birth of issue did not apply to a will expressly providing for those events. After the Act of 1872, birth of issue was no longer necessary, marriage in itself accomplishing the revocation. The court decided that in adopting this statute no change was intended in respect to the application of this rule to a will expressly made in contemplation of the marriage which subsequently took place. This is sound reasoning and common sense.

It may also be noted in passing that the court cited and approved the holding of *Phillip v. Clevenger*, 239 Ill. 117, that a will may be revoked by implication. This somewhat weakens the authority of *Limbach v. Limbach*, and if the question of implied revocation by a subsequent written will comes before our court, it is believed that the same enlightened consideration which is given in the instant case to the history and logic of the situation, would lead to a decision permitting revocation by implication.

C. B.

PROPERTY—ESTATES—LIMITATION OR PURCHASE.—A very interesting development of the distinction observed in estates in real property, between estates acquired by limitation and those had by purchase, is seen in the two cases, the earlier case of *Duffield v. Duffield*, 268 Ill. 30, and the recent one of *Jones v. Makemson*, 293 Ill. 534-538, 127 N. E. 730.

Both cases involved constructions of deeds. In the earlier of the two, the deed was in form an indenture and purported to be an agreement between the grantor and "Henry T. Duffield and the heirs of his body, grantee." The granting part of the deed, recited that the conveyance was to "the said grantee." There was no habendum.

In the latter of the two cases, the instrument was in form a deed poll, a statutory quitclaim deed, and this started right out with the granting clause, omitting, of course, any clause describing or constituting the parties. The granting clause was "to Hugh N. Makemson and the heirs of his body."

This statement of the two cases would seem clearly enough illustrative of the difference between the two situations without any discussion, for, in the first situation, the very sense of the juxtaposition of the two parties as in agreement, renders the one referred to as grantee such by purchase, as, if that deed had omitted that clause or recital altogether and had commenced with the granting part, transposing the words "Henry T. Duffield and the heirs of his body, grantee," as they appear in the recital of parties, for the word "grantee" as it appears in that granting part, the situation would have called for the same construction as in the later case.

As it was, in the earlier case, "Henry T. Duffield and the heirs of his body" took by purchase, and as "heirs of his body" was meaningless, he being still living, Henry T. Duffield was the grantee entitled. Whereas, in the later case, Hugh N. Makemson took by limitation of an estate tail, which gave him a life estate under the statute with an ultimate reversion of a portion as heir of his parents subject to the contingent remainder imposed by the statute.

In the same general connection, reference is made to the still earlier case of *Hanes v. Central Illinois Utilities Co.*, 262 Ill. 86-90, where it was contended that a provision in a will to William Thomas Keene for life and at his death to his children in fee, and if he die without children surviving, to his heirs at law in fee, operated to make William Thomas Keene purchaser of the fee and not merely a grantee by limitation, because the will also provided, as a condition, that William Thomas Keene or his heirs and legal representatives pay the executor \$500, and made that a charge on the rents, issues, and profits of the land. But the court in that case refused to hold the taking as by purchase because the \$500 was not a personal charge but a charge upon the rents, issues and profits, indicating in that distinction that if it had been a personal charge on the taker, the taking would be by purchase. E. M. L.

THE TRUST FUND THEORY—FRAUD IN REDUCING CAPITAL.—In the case of *Johnson v. Canfield-Swigart Co.*, 292 Ill. 101, 126 N. E. 608, our Supreme Court has handed down an important decision on the matter of the reduction of capital assets. The question arose on a bill in chancery filed by the trustee in bankruptcy of the Canfield-Swigart Co. against its stockholders and another corporation to recover the capital of the Canfield-Swigart Co. which had been paid out in dividends and to apply it in payment of the claims of creditors.

The creditors who claimed the right to follow the capital of the corporation into the hands of the stockholders who had received it in the form of a dividend had all extended their credit to the

corporation after its capital had thus been dissipated. But it appears that no correct statement of assets and liabilities was furnished to these creditors and that these creditors had no notice of the large dividend which had reduced the capital of the company.

The court allowed a recovery on the ground of fraud. It held that the complicated transactions involving the dividend and the transfer of all the stock to one irresponsible stockholder amounted to a sale of all the capital and assets of the corporation and a division thereof among the stockholders after the payment of all debts which were due from the corporation to the *stockholders* but without the payment of the other debts owed by it; that this amounted to a fraud upon the then existing creditors; that the continuance of the business as a going concern without sufficient means to replace the lost capital made it certain that the corporation would be obliged to borrow money to continue its business; and that since these transactions were all secret they amounted to a fraud upon the subsequent creditors. The decision was clearly sound upon the facts involved, but it is not apparent as to just how far the theory of the opinion will extend.

In the first place the court does not rely upon the trust fund theory in deciding this case, but holds that the trust fund doctrine does not apply except when the corporation is insolvent or where the transaction injuriously affects creditors directly. This statement of the trust fund theory begs the question. The real trust fund doctrine is not so limited. (*Kom v. Cody Detective Agency*, 76 Wash. 540, 136 Pac. 1155.) If the assets of the corporation are trust funds then they must be preserved at all times for all creditors, and creditors "directly" affected should stand in no better position than other creditors. Of course, in the case of insolvency, the assets of a corporation are always regarded as trust funds. *Graham v. Railroad Co.*, 102 U. S. 148. The dividend declared by the Canfield-Swigart Co. rendered it insolvent; and it certainly had a direct effect upon its creditors. Thus whether the court's statement of the trust fund theory is satisfactory or not it could have been relied upon as the theory of the case. But the court recognized the tendency of recent decisions to work out creditors' rights in these cases upon the ground of fraud and said that the facts of the *Canfield-Swigart* case undoubtedly made a very strong case of fraud that can be taken advantage of by both existing and subsequent creditors.

In this respect the case is in entire harmony with *Olmstead v. Vance & Jones Co.*, 196 Ill. 236, where the right of a stockholder to secure from his insolvent corporation a payment on a contract made with the corporation when solvent, to repurchase his shares of stock was denied, though the trust fund theory was relied upon in the decision of the case. In this part of the opinion, therefore, there is substantial accord with the previous record of our Supreme Court. But so far as fraud is concerned the decision is not materially helpful beyond the particular facts concerned; and in its definition of the trust fund theory the court leaves wide open to future construc-

tion the question of what creditors may be said to be injuriously affected by the transactions in question.

But the principal part of the decision has introduced a subject matter entirely new in any of the decisions in this state. The subject matter referred to is section 19 of the old corporation law which the court quotes as prohibiting the payment of any dividend when a corporation is insolvent or when such payment would diminish the amount of its capital stock. The opinion states that most all the courts of last resort in this country hold that conveyances reducing capital assets are fraudulent as to existing and subsequent creditors when there is a statute declaring such a conveyance illegal, and a considerable number of cases are cited in the opinion in support of this doctrine.

The cases so cited are directly in point on the proposition made by the court, but those which are most emphatic and important as authorities go much farther than our Supreme Court has ever considered necessary. These cases hold that where a statute prohibits dividends out of capital then no corporation may purchase its own stock under any circumstances and that contracts made by corporations to purchase their own stock are invalid even as between the parties and when the corporation is entirely solvent. This result is directly contrary to the cases of *C. P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; and *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150.

In other words there are three theories with regard to the reduction of capital assets:

First: The trust fund theory which in its true form prevents the reduction of assets as against the claim of any creditor arising at any time without notice except where the capital stock has been reduced in a statutory proceeding.

Second: The theory that all rights are based upon fraud, with its natural corollary that no creditor who has not been defrauded can recover. This theory has a latitude as wide only as the subject of fraud. Moreover it merges into the trust fund theory if the trust fund theory is to be reduced to the point where it relates only to assets when the corporation is insolvent, or to such action as *directly* affects creditors.

Third: The theory that the statute forbidding dividends out of capital is so clearly prohibitive that any such action is entirely illegal and may be set aside by any interested party and that a contract to purchase its own shares cannot be enforced against any corporation at any time.

Until the case of *Johnson v. Canfield-Swigart Co.* the principal decisions in Illinois were based upon the trust fund theory; but in view of other decisions holding that contracts for stock purchase were lawful such trust fund theory as was relied upon must be construed as consistent with the statement of that theory above quoted from the opinion in the principal case. This opinion also introduces for the first time in this state the theory of fraud and the statutory theory above referred to.

It will be observed that when the court referred to section 19 of the old corporation law it was quoted as *prohibiting* payments of dividends when a corporation is insolvent, etc. As a matter of fact section 19 of the act made no prohibition, but merely provided that if directors, etc., should pay any dividend when a corporation is insolvent, or which would render it insolvent, or diminish the amount of its capital stock, then all such directors should be liable for all the debts of such corporation then existing and thereafter to be contracted while they continued in office. The new Corporation Act, section 22, provides that: "The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases: . . . (2) for declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent or its capital is thereby impaired, to the extent of such dividend."

But while the old act in section 19 has thus been construed as a *prohibition* against the dividends therein defined, the new act, being not so strong, may perhaps not be construed in the same way.

It should, however, be noticed in this connection that the new act in section 34 when providing for statutory reduction of capital stock specifies that no reduction of the capital stock shall be lawful which renders the corporation bankrupt or insolvent, but that the capital stock may be reduced by a mere reduction of the shares, *if the assets are not reduced thereby, without creating any liability of the stockholders*. This statute does not provide that the stockholders shall be liable in case the assets are reduced in the reduction of the capital stock; but the subject is so far left open that, while the court may not read into the act an intent that they shall be held liable for any dividends received or assets paid to them, yet if the general theory of the law allows creditors to reach such dissipated assets in cases where the statutory form of reducing the capital stock is not followed there is nothing in this new law which would prevent the operation of such a rule in cases where the statutory method of reducing capital stock is followed. But in this respect the rule in the case of *Gade v. Forest Glen Brick Co.*, 165 Ill. 367, is different; for there it was decided that a statutory reduction of capital would protect stockholders receiving assets of the company at such time from liability to all subsequent creditors.

Therefore the law of Illinois is still doubtful under the old statute and under the new. As heretofore it is clear that in all cases of actual fraud dividends of capital will be set aside at the instance of the creditors affected. It is also probable that in the restricted form, as explained by the court, the trust fund theory will still be relied upon. But the effect of the provisions of the old law in section 19 and of the new law in sections 22 and 34 cannot be predicted.

W. B. H.

BANKRUPTCY—PROVABLE CLAIMS—TORT CLAIM—UNJUST ENRICHMENT—PARTNERSHIP.—*Schall v. Camors*, 40 Sup. Ct. Rep. 135, attempts to put at rest any doubt of the view held before and since the case of *Re Hirschman*, 104 F. 69, 4 A. B. R. 715, that a

pure tort which coincidentally is neither a breach of contract nor which results in unjust enrichment, is not a provable claim. However, it may be observed that the discussion of this point which constitutes the major part of the opinion was wholly irrelevant to the real question.

The bankrupts were a partnership, and two individuals who constituted the partnership. The partnership as such had been unjustly enriched through negotiation of bills of exchange and checks supported by forged bills of lading, to the extent of about \$70,000. Claimant attempted double proof—against the partnership and against the estates of the partners. A decree expunging the claims against the individual estates was affirmed.

The apparent difficulty of the problem whether a tort claim is provable, is caused by the lack of harmony between §§ 63 and 17 of the Bankruptcy Act. Section 63 provides in substance that debts which may be proved are : (1) fixed liabilities, absolutely owing, based on a judgment or a written instrument; (2), (3) certain taxable costs; (4) claims founded on an open account, or upon a contract express or implied; (5) provable debts reduced to judgment after petition in bankruptcy.

The only debate involved in this section, as to tort claims, was in those cases where the same operative facts gave two remedies, one in tort and another in contract, at the election of the claimant. (It had been considered as settled until the question was revived in *Crawford v. Burke*, infra, that § 63b providing for the liquidation of claims, adds nothing to the five kinds of provable claims above enumerated: *Dunbar v. Dunbar*, (1903) 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757.) Where such a double remedy exists, it has been determined, contrary to rulings made in cases under the Bankruptcy Acts of 1841 and 1867, that the election of the creditor to sue in case or in assumpsit does not affect the provability of his claim. Thus, an action in trover for conversion of a reversionary interest in certificates of stock pledged with brokers, is met by a plea of discharge in bankruptcy, because the claim is one founded on (i.e., which at its inception was) a contract and was provable under § 63a (4): *Crawford v. Burke* (1904), 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9.

Section 63 has a variety of difficulties of its own, apart from other sections; but an entirely unique controversy was unavoidable in the peculiar phrasing of § 17 which, as originally enacted (30 Stat. 550), provided, in substance, that a discharge shall release a bankrupt *from all his provable debts except* (1) taxes; (2) judgments in actions for bonds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) unscheduled debts; (4) created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer in any fiduciary capacity.

The original version of § 17 was quite an unhappy one as was to be seen in the difficulty, real or imaginary, encountered by the

court in *Crawford v. Burke* (195 U. S. 176). In that case the court asks:

"If no fraud could be made the basis of a provable debt why were certain frauds excepted from the operation of a discharge?"

The difficulty we believe was imaginary and not real, since in that case the court disposed of the controversy in the last analysis by simply referring to the terms of § 63 under which the claim was provable as one "*founded . . . upon a contract express or implied.*" The question unnecessarily raised in *Crawford v. Burke* (we say unnecessarily in view of the ratio decidendi) arose in new form after the amendment of 1903 which accentuated the discord of §§ 63 and 17. In *Brown v. United Button Co.* (1906), 149 F. 48, 79 C. C. A. 701, the court enlarges the question of *Crawford v. Burke* (195 U. S. 176) and asks:

"If no tort could be made the basis of a provable debt, why were certain torts excepted?"

In the *Brown* case the court disposes of the question by saying of § 17:

"It is not declared what debts shall be released but what shall not be. And they must, in terms, be first provable, in order to be excepted, and not the contrary."

The court then suggests as to the changes made by the amendment of 1903 which substituted the term "liabilities" for "judgment" in § 17 (2)—a change fatally destructive of the possibility of any grammatical harmony in §§ 17 and 63—and added as further exceptions, alimony, seduction, and criminal conversation, that they were in part "unnecessary" and inserted "out of extra caution" but without care "to note the possible effect upon other parts of the law." (See, also, *Re N. Y. Tunnel Co.*, 159 F. 688.) (The amendment of 1917 has further added breach of promise accompanied by seduction: 39 Stat. 999.)

It is perfectly clear that § 63 is to be interpreted without reference to § 17, but as long as § 17 stands in its present anomalous and illogical form there constantly will be a tendency to enlarge § 63 by reference back to § 17. The need of recasting § 17 so that it will be intelligible is obvious.

A. K.

DIVERSITIES DE LA LEY

NO JEALOUSIES BETWEEN ADMINISTRATIVE AND JUDICIAL TRIBUNALS.—The development of administrative tribunals, as a new organ of justice, has been one of the significant features of the last quarter century. Eminent legal thinkers, notably Professor Roscoe Pound, have called attention to the naturalness of this evolution.¹ It is destined to be, in its day and way, as remarkable a phenomenon as the separate growth of the Chancery Court five centuries ago, and its arrogation to itself of new fields of justice or of old ones not adequately handled by the common law courts. The newest form of this development, the Industrial Court, in Kansas, was noticed in the March number of this REVIEW; it performs judicial functions in a new field, and yet it is separate from the ordinary courts and belongs in traditions rather to the same genus as the Federal Interstate Commerce Commission and the numerous State Public Utilities Commissions and Workmen's Compensation Commissions.

But the development of five centuries ago (in which one new Court—the Court of Requests—was finally overcome by the Common Law Courts, while another—the Court of Chancery—successfully and greatly survived) did not take place without long and sometimes vigorous and acrimonious resistance—a result of the personal and official jealousies incident to the rivalry for jurisdiction. One of the final phases of this jealousy came in Sir Edward Coke's time, just three centuries ago; Lord Chancellor Ellesmere, with his opinion in the Earl of Oxford's case, was the winner. Coke threatened to imprison everybody concerned; but the King's Bench finally submitted to the Chancery's authority to enjoin proceedings at law—though Bacon finally caused Coke to be suspended from office.

What of our new American tribunals? Is there to be a like period of personal jealousy and open, undignified controversy? Hitherto the regular tribunals have maintained their reviewing supremacy, entrenched as it is in the constitutions; but they have also left to the administrative tribunals enough breadth of discretion to satisfy them—whether or not it satisfies the clients. But these new fields for the new tribunals are yearly growing in bulk and in public prominence. Ten years from now, will jealousies have become apparent—jealousies in the regular tribunals on perceiving the diminution of their relative importance?

1. *E. M. Parker*, "Executive Judgments and Executive Legislation" (1906; 20 Harv. L. Rev. 116); *T. R. Powell*, "Conclusiveness of Administrative Determinations in the Federal Government" (1907; 1 Pol. Sci. Rev. 583), "Administrative Exercise of the Police Power" (1911; 24 Harv. L. Rev.); *Roscoe Pound*, "Executive Justice" (1907; Pennsylvania Law Review, March, 1907); and, most recently, his address before the American Bar Association at the 1919 Annual Meeting.

Now is the time for magnanimity on the part of the incumbents of the regular tribunals. It is for them to take the lead in recognizing and publicly acknowledging the trend of events and the worthy status of the new tribunals.

All this is merely prefatory to calling attention to just such a magnanimous pronouncement, emanating from the Supreme Court of Illinois, through Mr. Justice Thompson, placed on record in a formal judicial opinion. In *State Public Utilities Commission v. Springfield Gas & Electric Co.*, 291 Ill. 209, 125 N. E. 891, Feb. 6, 1920, the powers of the Commission to fix rates were in question, and the opinion contains this passage:

"It is clear from the salary fixed for the commissioners and the great power vested in the commission by the Public Utilities Act that the Legislature intended to create an office of dignity and great responsibility. It is therefore not to be expected that through fear of popular disfavor the commission will coyly toy with the situation. It sits to administer justice to individual and corporation, the weak, the strong, the poor, the wealthy, indifferently, fearing none and fawning on none. *The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can only be had in courts, is not conducive to the best results.* There is no reason why the members of the Public Utilities Commission of this state should not *develop and establish a system of rules and precedents as wise and beneficial, within their sphere of action, as those established by the early common law judges.* All doubts as to the propriety of means or methods used in the exercise of a power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law. There should be ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience."

This is a far-seeing and magnanimous utterance, and augurs well as a sign of the times. We trust that its spirit will find an echo in other Supreme Courts, now and hereafter. J. H. W.

FISH AS AGRICULTURAL PRODUCTS.—Are fish ever to be regarded as agricultural products? This is the question dealt with in *Molina v. Rafferty*, 37 Philippine Reports 545. Molina, the owner of certain fish ponds in the Province of Bulacan, had sent to Manila a consignment of fish. After its sale by the commission merchant, Rafferty as Collector of Internal Revenue demanded of Molina that he pay, in respect of the proceeds, a so-called "merchants" tax amounting to 71.81 pesos. This tax, it appears, is one made payable by the Internal Revenue law upon gross sales of merchants. Molina paid the amount under protest and brought suit against the collector for its recovery. As the statute expressly provided that no "agricultural products when sold by the producer or owner of the land where grown" were to be subject to the merchants' tax, the plaintiff's liability for the tax depended upon whether or not the fish were to be considered agricultural products.

From the statement of facts we learn that fishponds such as those owned by Molina are artificially constructed, by means of

dykes built on swampy ground or on rice fields adjoining the water. The fish, of a variety known as "bañgus," are raised from fry ("semillas"). The fry are first introduced into a special compartment and after attaining a certain growth are turned into the other portions of the pond. "This compartment for 'semillas' is allowed to dry and is cleaned well before the 'semillas' are placed therein; it is even plowed to kill all the bugs that may eat up the fish. In order to make marine plants grow a small quantity of sea water is allowed to enter. . . . The food of the 'bañgus' includes marine plants. These algæ are of seven classes. . . . One of these plants is rooted. Some of the others are very loosely attached to the ground. Generally the algæ float in the water."

The majority of the court hold against Molina's contention. The opinion (by Mr. Justice Malcolm) does not rely upon the strict etymology of the word "agriculture." It concedes that the term may include more than vegetable products derived from tillage of the soil. Quoting the definition of Webster that agriculture is "the art or science of cultivating the ground, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops and the rearing, feeding, and management of livestock," the opinion proceeds: "Let us test our facts by this definition. The ground of the fishpond is cultivated. The soil is prepared. We, however, greatly doubt that the seeds (of fish) are planted or that crops (of fish) are raised and harvested. Certainly the seeds of fish are not sown in the ground as one would sow corn, while as distinguished from the rearing, feeding, and management of livestock which consumes the products of the farm, the fish living in water, depending upon water for life, only receive nourishment from marine plants, most of which have little or no connection with the land." Again, the court says: "To indicate further the wide sweep of the term 'agricultural products' and to show how such terminology influences those who disagree with us, the term 'agricultural products' has been held to include swine, horses, meat cattle, sheep, manure, cordwood, hay, poultry, vegetables, fruit, eggs, milk, butter, and lard. (See *Mayor v. Davis*, 6 W. & S. 279.) *But never by any court to include fish.*"

We are strongly impressed with the fact that fish are here most unjustly discriminated against. Simply because nature has endowed them with gills instead of lungs and fins instead of feet, they are to be excluded from the privileged category in question. Because they are hematocryal instead of hematothermal, they are to be regarded as rank outsiders. Because they sparingly dine upon tender shreds of marine algæ instead of bolting gargantuan quantities of three dollar corn, the heavy hand of the tax collector must fall upon the head of their devoted master. Because they pursue the even tenor of their aqueous existence in dignified silence instead of giving forth the hoarse bellowings and shrill neighings of certain acknowledged agricultural products, they are looked at askance by an unsympathetic court, the while it cuttingly observes: "If fishing is farming, then conversely, farming must be fishing . . . 'tillers of the soil are not wont to plow the fields in quest of rock or in anticipation of a

crop of fishes or of pearls.' " The last remark, which is quoted from an opinion of the Attorney General of the Philippines (3 Op. Atty. Gen. 65) is one whose crushing injustice the "bañus" must feel most keenly for it is precisely in anticipation of a crop of "bañus" that the assiduous proprietor has plowed the soil of the compartment wherein he installs the "semillas."

One lone voice is raised on behalf of these poor victims of statutory construction, that of Mr. Justice Johnson, speaking for himself and Mr. Chief Justice Arellano. The learned judge begins by pointing out that the majority opinion fails to distinguish between a "pesqueria" and a "vivero de peces." The former is "a species of trap placed upon the farm in which fish are caught from time to time, while a 'vivero de peces' may be defined as a part of the farm set aside for the raising or production of fish" in the same manner as for the raising of the ordinary animal and vegetable products of the farm. If the habitat of the fish in question had been a "pesqueria," then Mr. Justice Johnson would have had no quarrel with his brethren. But the fact is that they dwelt in a "vivero de peces." Our first impression was that Mr. Justice Johnson had himself here committed an act of discrimination in drawing a class distinction, depending solely upon the external fact of residence, between two equally worthy groups of "bañus." But the learned judge's analogy of the "pesqueria" to "a trap placed in the fields for the purpose of catching wild animals," has quite convinced us that the dichotomy is an inevitable one.

With this premise, Mr. Justice Johnson comes valiantly to the defense of the "bañus" commorant in the "vivero de peces." "The majority opinion," says he, "admits that domestic fowls—chickens, ducks, geese, turkeys—and eggs, butter, lard, milk, vegetables, fruit, etc. are agricultural products, but argues that nothing is, or may be considered, an agricultural product which does not result from a cultivation of the soil. To admit that eggs, butter, lard and milk are agricultural products, and to argue that nothing is an agricultural product which does not result from a cultivation of the soil, presents a consistency in argument and conclusion which we are unable to understand. It is admitted that the land for a 'vivero de peces' is specially prepared. A certain cultivation and preparation is necessary for the creation of a 'vivero de peces.' It is difficult to understand what special preparation of the soil is necessary for the production of hens' eggs, butter, lard, milk or cattle, or sheep or horses or hogs or goats, which makes these products agricultural products. It is a matter of common knowledge that land may be specially prepared for the production of rice this year and then changed into a 'vivero de peces' next year and vice versa. . . . It is admitted in the majority opinion that the land for a 'vivero de peces' must be specially prepared by first building dykes and cultivating the land preparatory to the planting of the fish. The only difference, therefore, between the preparation of a 'vivero de peces' and the preparation of a rice paddy is one in extent of labor employed. In both cases the land is specially prepared for the particular purpose to which the

farmer desires to devote it. Forgetting for a moment the stereotyped and the lexicographer's definition of agricultural products, and forgetting for a moment that there is no more difference, so far as the method of production is concerned, between the production of corn and the production of ducks and eggs, we will find ourselves drawn to the conclusion that from the standpoint of method of production there is no difference between the production of fish in a 'vivero de peces' and the production of ducks upon land which is recognized as agricultural lands. The majority opinion has fallen into error by trying to make a 15th century definition apply to 20th century conditions."

We emphatically concur, though it seems to us that the "vivero de peces" antedates the 20th century. Surely it was in something like the "vivero" that the mediaeval monks kept and fattened their carp. This apart, we offer our tribute of praise to Mr. Justice Johnson as the champion of the down-trodden "bañus." Why, indeed, should a duck be entitled to the "privilegium de non taxando" and not a "bañus"? Every consideration of sound logic requires us to place the latter on at least an equal footing. But the majority of the court, we fear, is too firmly intrenched in its error ever to be induced to do justice to the "bañus." The cause of the "bañus" is hopelessly lost. While deploring their untoward fate, we may, however, be permitted to extend our active sympathy to the owner of the "vivero de peces." Nay, we may even hope to alleviate his lot by venturing a concrete suggestion or two. In view of the several considerations advanced in the majority opinion, we would urgently recommend that the agri-pisciculturist turn his attention away from the unhappy "bañus," now beyond the reach of help, and restock his "vivero" with a new and different tenantry. For instance, there is the Bombay duck. To be sure, we have never seen it save in a dried condition, but we have no doubt it would be much at home in the "vivero." With a stock of these the proprietor would be in an almost impregnable position so far as regards immunity from the merchants' tax. For, if an ordinary duck be an agricultural product, could the court, with anything like good grace, say that a Bombay duck was not? Then, again, there is the "lophius piscatorius," known on the New England coast as the goose-fish. Its ability to walk on the bottom of the sea should find favor in the eyes of the court. The sea cow, of course, would rather crowd the "vivero," but what of the cow-fish ("ostracion quadricorne")? The latter, as well as the hog-fish and goat-fish should have no difficulty in qualifying. The sheepshead, too, possess a certain eligibility which ought not to be overlooked, while the claim of the chicken halibut is most respectable. Reliance can surely be placed upon the butterfish and pumpkinseed; they are nothing if not bucolic. And, if the clientele of the Manila commission-merchant should be at all hippophagous, there is always the sea horse to fall back on. Of course, we cannot undertake to vouch for the edible quality of all we have named, nor their adaptability to Philippine waters; still, with intensive cultivation, we dare say much can be done in both directions. But, whatever variety be selected, we

would solemnly adjure the proprietor of the "vivero," in taking our leave of him, by no means to neglect the necessary precaution of seeing that of the marine algæ destined for the sustenance of this new and more agricultural stock, *every plant* is firmly rooted in the soil of the "vivero."

R. W. M.

A CASUAL ORIENTAL LEGAL ODYSSEY.—Recently, notwithstanding the inconvenience of traveling under existing abnormal conditions, I ventured on a little journey through Japan and China. It was not the first time that I had traveled in these countries as a tourist, but it was the first occasion in which I had given myself up completely to things legal.

In Tokyo, Japan, I had the pleasure of attending a special general meeting of the Japan Bar Association and of taking part in a portion of the deliberations which resulted in the formation of what was called "The International Bar Association." Assembled at this convention were lawyers, over a thousand in number, representative of the various races which find their habitat in the Far East. There were, of course, Japanese, and with them Chinese, Koreans, Filipinos, Siamese, two or three Americans, a stray Englishman, and a Dutchman from Java. The language used in the discussions ranged from Japanese and English to Chinese and Spanish. The outcome of the meeting was the organization of "The International Bar Association," although, because of the members constituting it, it might more accurately and appropriately be termed "The International Bar Association of the Orient." The officers of the temporary organization are, Dr. Masujima, president; Dr. Horiye, secretary, and Mr. Hiramatsu, treasurer, all prominent lawyers of Japan.

One feature of Japanese legal institutions which impresses itself on the American observer is the respect shown to distinguished lawyers and the sharp division which is drawn between the bar and the bench. The lawyers in Japan have their own bar association, and the judges have their own judges' association. The only occasion when the visitors were to meet the members of the judiciary was when the Supreme Court justices offered a reception in honor of the Japan Bar Association and its guests.

From Japan the tourist's itinerary takes one through Korea or, as the Japanese now call it, Chosen, to the ancient and interesting city of Peking. There, with my old friend Justice Hu, who, by the way, is a graduate of the University of Chicago Law School, as my cicerone, I was able to meet the Secretary of Justice, the Chief Justice of the Supreme Court, and others, high in Chinese judicial circles.

The Supreme Court of China is an ancient institution which has taken on a new lease of life with the inauguration of the Chinese republic. It is housed in a stately and commodious building. There are found the court-rooms, for more than one is needed because of the different divisions of the court, the library, the judges' recreation room, and the offices of the twenty-seven members of the court and

of the court personnel. The Chief Justice, Yao Tseng, is an alert and keen young man who admits to being thirty-seven years of age. In fact the oldest member of the court can only claim forty-five years. When one compares these youthful men with the more elderly gentlemen who usually make up the highest tribunals of other courts, one may be pardoned if he reflects on whether or not the advantages of youthful energy and progressiveness do not more than balance age's wisdom and conservatism.

In my long conversation with the Chief Justice in his office, and again when I was entertained, as only the Chinese can entertain, in his beautiful home, I took the liberty of asking him certain pertinent, and possibly impertinent, questions concerning the attitude which the Supreme Court was taking on fundamental constitutional questions. For instance, I was anxious to know whether in China the judiciary was merely an adjunct of the executive department, or whether it was in reality an independent and co-ordinate power. I could not be in doubt of the attitude of the Supreme Court, as I listened to the vigorous explanation of China's John Marshall. The Chief Justice pointed out that on one memorable occasion a judge had been reprimanded by President Yuan Shi Kai because, in the words of the president, the judge had been "too subservient to the law." Again, when the Supreme Court took the view that it had the power to try and decide legislative election cases, and the parliament took the view that it had not, it was the parliament which was finally forced to give in and withdraw its resolution of censure. I asked the Chief Justice also if the judiciary had ever declared an act of the Chinese parliament to be unconstitutional. While apparently no such question had been presented I gained from the reply that the Chief Justice of the Supreme Court of China would take a stand as firm and as fearless in defense of the supremacy of the Constitution as that taken by Marshall in the early days of the American republic. Among other things I also inquired as to whether the rule of stare decisis was in force. I must admit that I was rather pleased personally when the answer came that the continental, rather than the American idea of the respect which should be accorded precedent, was favored in China.

No uncertain compliment for the judiciary was brought to my attention when the Minister of Justice informed me that notwithstanding the internal strife between the North and the South, with the exception of Canton, all of China was united by the bonds of a common judiciary.

A unique feature of the Chinese judicial system is that judges and lawyers are trained in different schools. The law of the organization of the judiciary of the Chinese republic (Art. 106) provides that only such persons as have passed the two examinations mentioned in the regulations for judicial examinations for appointments shall be appointed as judges or procurators.

When I was about to leave China, I received the benediction, with which it is usual to favor the departing visitor, of having a number of pamphlets thrust upon me. Those interested in com-

parative law may, however, like to know the titles at least of these documents, now available in English. They include a brief account of the reorganization of the Supreme Court of China by a member of the court; the law of organization of the judiciary of the Chinese republic; the Supreme Court regulations of China; the provisional Criminal Code of the Republic of China; the regulations of the Arbitration Court of the Chinese republic; commercial associations; Ordinance of the Chinese republic; provisional regulations for the detention houses; concise statistics of the Supreme Court of the Chinese republic from the first to the sixth year; and the Chinese Supreme Court decisions, first installment.

The decisions of the Supreme Court of China are fortunately, in these days of many law books, not published in toto. The first installment, relating to general principles of civil law and commercial law, is a thin volume of thirty-nine pages. It offers to the world, to use the words of the president of the Supreme Court in his prefatory note, "a work comprising the case law in a codified form." The principles have been abstracted by the codifiers from the decisions delivered by the Supreme Court, then corrected by the judges, and published in book form. The able translator of the decisions, who must be more than translator because of the marked differences between the Chinese and the English languages, is Justice F. T. Cheng, barrister-at-law of the Middle Temple, London. This compilation has more than ordinary interest because the Civil Code of China has not yet been promulgated and, consequently, the principles enunciated by the Supreme Court, notwithstanding the failure to respect precedent, have almost the same force as law. The preface by the translator states that many of the principles embodied in the volume bear traces of western jurisprudence.

Justice Wenfu Yiko Hu, of the Supreme Court of China, in an address on "Progress in the Chinese Administration of Justice," concludes with these words:

"Chinese progress during recent years has, after all, been phenomenal, and we may confidently claim, without fear of contradiction, that a new national spirit has been built up, and that the country has been furnished with a legal equipment sufficient to carry it to still more glorious paths of achievement."¹

With as much reason could praise be given to the law and institutions of Japan.

I left Japan and China to return to the Philippines where, under the Stars and Stripes, the poet to the contrary, the East and West have met, with considerably more respect for my professional brethren of the Orient. One came back with the thought that the United States certainly has no monopoly on judicial learning and that a most fascinating comparative study could be made of the legal institutions of the three leading nations of the Far East, the Japanese, the Chinese, and the Filipinos.

GEORGE A. MALCOLM.

Supreme Court of the Philippine Islands, Manila.

1. *Philippine Law Review* (April, 1919), VI, 104.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYER'S ASSOCIATION.—187. *Question:* In pending divorce action, unaffected by any color or question of collusion, but in which the parties intend to stipulate as to the provisions for alimony, counsel fee, etc.

(1) May they with propriety stipulate that the name and address of the co-respondent shall not be mentioned in the pleadings, at the trial or otherwise in the action;

(2) May the stipulation with propriety contain a provision that the stipulation itself shall not be used or mentioned in the action?

Answer: In the absence of some law or rule of which we are not advised requiring the name of the co-respondent if known to be stated in a complaint, it is the opinion of the committee that the parties to a divorce action may properly stipulate that *unless the court shall require the disclosure*, the name and address of a co-respondent shall not be mentioned in the pleadings, at the trial or otherwise, but they may not with propriety stipulate that the stipulation itself shall not be used or mentioned in the action. It is also the opinion of a majority of the committee that in view of the duties imposed upon the court in an action of this sort any such stipulation between the parties should be disclosed to the court.

In formulating the foregoing answer the committee has not overlooked section 1757 of the New York Code of Civil Procedure relating to the right of the co-respondent to defend if named in the pleadings.

188. *Question:* Section 417 of the New York Code of Civil Procedure provides that the summons in an action brought in the Supreme Court must contain the name of the county in which the plaintiff desires the trial.

Sections 982, 983, and 984 provide for the place of trial of certain designated actions, and under such provisions an action for divorce must be tried in the county in which one of the parties (if a resident) resided at the commencement of the suit, and section 985 provides that if the county designated in the complaint as the place of trial is not the proper county the action may notwithstanding be tried therein, unless the place of trial is changed to the proper county upon the demand of the defendant followed by the consent of the plaintiff, or the order of the court.

It appears that in consequence of the provisions of section 985 a practice has grown up of designating Westchester County as the place of trial in divorce actions, though the parties reside in New York County, and, in the absence of the demand of the defendant, proceeding to trial in Westchester County, probably to avoid undesirable publicity and notoriety incident to the filing of the papers and the conduct of the trial in New York County, where they are more likely to receive public attention through reference to them in the metropolitan dailies. The resort to Westchester County is (it is contended) justified as a matter of legal right, in the absence of demand from the defendant, as provided in the statute, and as desirable from the standpoint of the plaintiff for the purpose of avoiding unnecessary publicity and notoriety.

It is reported that the practice has recently been unfavorably commented upon by a judge sitting in Westchester County in a case brought before him. In order that counsel and parties may be advised of the propriety or impropriety of this practice, assuming that it is within the legal rights of the plaintiff by reason of the provisions of section 985 of the Code of Civil Procedure, will your committee express an opinion on the subject?

Answer: The committee does not feel that it is required to determine the public policy indicated by the legislation cited in the question, as it does not assume to construe statutes. In the absence of some further declaration of such policy, either legislative or judicial, it is not aware of any professional impropriety in the course suggested.

A ROMAN LAW PROBLEM.—A pettifogger, Mencken, gave instruction to one Schulze in commerce, banking, and exchange, as well as legal training in general, and for procedural representation in courts of first instance. It was provided in the contract that the instruction was to be concluded in six months, and Mencken, who knew Schulze very well, agreed that within this time Schulze would be able to carry on independently one of these pursuits. Mencken was to receive six hundred marks, but payment was conditioned on Schulze's winning his first case in the court of first instance. If he lost it, he was to pay nothing.

The six months passed according to program. Afterwards Schulze settled down as counselor-at-law and 'people's advocate,' and gave advice to small people for a good compensation; but he never accepted a case in court and did not pay Mencken.

After repeated demands for his money, Mencken commenced suit.

He contended: Under any circumstances, the defendant is bound to pay. Either he will be condemned and must pay accordingly, or he will win this suit and then he must pay in accordance with the agreement.

Schulze objected: I will not have to pay in any event. Either I will lose this suit and then, according to the contract, I will not have to pay, or the plaintiff will be defeated, in which case also I will be absolved.

Who is right?

[Translated from Stammeler, "Praktische Pandektenübungen für Anfänger," p. 165, by A. K.]

RALPH E. CLARK.—Mr. Clark, who contributes an article to this issue of the REVIEW on "Proof by Secured Creditors in Insolvency and Receivership Proceedings," is a member of the Cincinnati bar. He is author of a well-known text-book on Receivers.

BOOKS AND PERIODICALS

A PRACTICAL TREATISE ON TITLE TO REAL PROPERTY, Including the Compilation and Examination of Abstracts, with Forms. By George W. Thompson. Indianapolis: The Bobbs-Merrill Company, 1919. Pp. lxxxii+1112.

The unacknowledged debt which the author of this work owes to Warvelle has already been pointed out by Professor Ballantine (H. L. R., XXXII, 742). The thirty-two chapters of Warvelle on "Abstracts" correspond to the first thirty-one chapters of this work. Occasionally two of Warvelle's chapters are combined into one, or one chapter split into two, and the order of the chapters is slightly varied; but the chapters, the chapter headings, the sections and the section headings are essentially the same, and such changes as there are, evidence a desire to conceal the identity of the two treatments rather than a desire to better the arrangement. Within the sections there is a less close adherence to Warvelle, but even here the author has made extensive use of Warvelle's language with slight adaptations. The changes in the text are somewhat greater than usually occur in later editions by the original author, and the ascription of the book to the present author would not be objectionable if it were frankly stated to be an adaptation of the original. There are three additional chapters which digest the statutes pertaining to the execution and acknowledgement of deeds, descent, and wills. There is a fourth additional chapter on registration of title under the Torrens System. Those who find Warvelle useful may also find that this work sheds some additional light on the subjects which Warvelle treats.

State University of Iowa.

PERCY BORDWELL.

ARTICLES IN PERIODICALS

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SALE OF GOODS ON C. I. F. TERMS. *Edward A. Craighill, Jr.* 6 Va. L. Rev. 229.

LAW OF THE SEA AND THE GREAT WAR. *Edmund F. Trabue.* 6 Va. L. Rev. 240.

FUNCTIONS OF THE STATE CORPORATION COMMISSION OF VIRGINIA IN ISSUING CHARTERS. *Christopher B. Garnett.* 5 Va. L. Reg. n. s. 737.

FINGER PRINTS CAN BE FORGED. *Milton Carlson.* 5 Va. L. Reg. n. s. 765.

BLOODHOUND AS A WITNESS. *John C. McWhorter.* 26 W. Va. L. Q. 91.

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WEBB-POMERENE LAW—EXTRA-TERRITORIAL SCOPE OF UNFAIR COMPETITION CLAUSE. *William Nots.* 29 Yale L. Jour. 29.

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- COURT-MARTIAL SYSTEM AND ANSELL ARMY RULES. *Edmund M. Morgan*. 29 Yale L. Jour. 52.
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- GENERAL AND SPECIAL VERDICTS. *Edson R. Sunderland*. 29 Yale L. Jour. 253.
- NATURE OF TRADE-MARK. *W. L. P. A. Molengraaff*. 29 Yale L. Jour. 303.
- CRISIS OF MODERN JURISPRUDENCE. *Paul Vinogradoff*. 29 Yale L. Jour. 312.
- SEPARATION OF GOVERNMENTAL POWERS. *Frederick Green*. 29 Yale L. Jour. 369.
- LAW AND EVOLUTION. *W. Jethro Brown*. 29 Yale L. Jour. 394.
- CONVEYANCES OF REGISTERED LAND. *James E. Hogg*. 29 Yale L. Jour. 401.
- POWER OF GOVERNMENT OVER SPEECH AND PRESS. *Fred B. Hart*. 29 Yale L. Jour. 410.
- SELECTING AND RETIRING JUDGES: WHY POPULAR ELECTIONS FAIL IN CITIES. *Jour. Am. Judicat. Soc.*, III, 165.
- THE COURTS AS AUTHORIZED LEGAL ADVISORS OF THE PEOPLE. *Edson R. Sunderland*. *Am. L. Rev.*, LIV, 161.
- JUDICIAL CONTROL OVER LEGISLATURES AS TO CONSTITUTIONAL QUESTIONS. *Jackson H. Ralston*. *Am. L. Rev.*, LIV, 193.
- THE SPIRIT OF OUR JUDGES. *Everett V. Abbot*. *Am. L. Rev.*, LIV, 231.
- IS THERE AN EIGHTEENTH AMENDMENT? *Justin D. White*. *Am. L. Rev.*, LIV, 245.
- THE LAW AS A TRUE INDUCTION. *James M. Kerr*. *Am. L. Rev.*, LIV, 265.
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- REVOLUTIONARY COMMUNISM IN THE UNITED STATES. *Gordon S. Watkins*. *Am. Pol. Sc. Rev.*, XIV, 14.
- THE NEW GERMAN CONSTITUTION. *Walter J. Shepard*. *Am. Pol. Sc. Rev.*, XIV, 34.
- CONSTITUTIONAL LAW IN 1918-1919—II. *Thomas Reed Powell*. *Am. Pol. Sc. Rev.*, XIV, 53.
- AMERICAN GOVERNMENT AND POLITICS. *Lindsay Rogers*. *Am. Pol. Sc. Rev.*, XIV, 74.
- THE DECLARATORY JUDGMENT IN CALIFORNIA. *Maurice E. Harrison*. *Calif. L. Rev.*, VIII, 133.
- LAW OF MUNICIPAL HOME RULE IN OREGON. *Richard W. Montague*. *Calif. L. Rev.*, VIII, 151.
- "THE GREEN GOODS GAME" IN 1815. *Wm. R. Riddell*. *Can. L. Times*, XL, 184.
- STUDY OF ROMAN LAW. *Bram Thompson*. *Can. L. Times*, XL, 189.
- GUARANTIES AND STATUTE OF FRAUDS. *J. D. Falconbridge*. *Can. L. Times*, XL, 197, 304.
- CODIFICATION OF LAWS. *J. Ogle Carss*. *Can. L. Times*, XL, 216, 292.
- HOW KING'S BENCH CAME TO TORONTO. *Wm. R. Riddell*. *Can. L. Times*, XC, 188.
- PROXIMATE CAUSE AND LEGAL LIABILITY. *Albert Levitt*. *Can. L. Jour.*, XL, 280.
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- CRIMINAL CODE OF THE REPUBLIC OF CHINA. *Chin. Soc. and Pol. Sc. Rev.*, V, 213.
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- TREATY AMENDMENTS AND RESERVATIONS. *Albert H. Washburn*. *Cornell L. Q.*, V, 247.
- ADMIRALTY AND THE WORKMEN'S COMPENSATION LAW. *Francis J. MacIntyre*. *Cornell L. Q.*, V, 275.
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- REBIRTH OF THE HARVARD LAW SCHOOL. *Franklin G. Fessenden*. *Harv. L. Rev.*, XXXIII, 493.
- LANGDELL AND THE LAW SCHOOL. *Charles W. Eliot*. *Harv. L. Rev.*, XXXIII, 518.
- THREE SUGGESTIONS CONCERNING FUTURE INTERESTS. *Ernst Freund*. *Harv. L. Rev.*, XXXIII, 526.
- LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING—THE RULE OF THE FUTURE. *Jeremiah Smith*. *Harv. L. Rev.*, XXXIII, 542, 667.
- WILLS AND ADMINISTRATION: PROGRESS OF THE LAW, 1918-1919. *Joseph Warren*. *Harv. L. Rev.*, XXXIII, 556.
- PROXIMATE CONSEQUENCES OF AN ACT. *Joseph H. Beale*. *Harv. L. Rev.*, XXXIII, 633.
- AMENDING THE CONSTITUTION OF THE UNITED STATES. *Wm. L. Frierson*. *Harv. L. Rev.*, XXXIII, 659.
- TRUSTS: PROGRESS OF THE LAW, 1918-1919. *Austin W. Scott*. *Harv. L. Rev.*, XXXIII, 688.
- STUDIES IN INHERITANCE TAXATION. *Allen Sherman*. *Maine L. Rev.*, XIII, 78.
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- DOCTRINE OF BAD FAITH IN THE LAW OF NEGOTIABLE INSTRUMENTS. *Geo. W. Rightmire*. *Mich. L. Rev.*, XVIII, 355.
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- COPYRIGHT AND MORALS. *Edward S. Rogers*. *Mich. L. Rev.*, XVIII, 390.
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- EXAMINATION OF TITLES IN VIRGINIA. *Andrew D. Christian*. *Va. L. Reg. (N. S.)*, V, 817.
- FIDUCIARY POWERS OF NATIONAL BANKS. *Walter Wyatt*. *Va. L. Rev.*, VI, 301.

- SUSAN B. ANTHONY AMENDMENT: EFFECT OF ITS RATIFICATION ON RIGHTS OF STATES TO REGULATE ELECTIONS. *Emmet O'Neal*. Va. L. Rev., VI, 388.
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- CRIMINAL RESPONSIBILITY OF SOVEREIGNS FOR WILLFUL VIOLATIONS OF LAWS OF WAR. *S. S. Gregory*. Va. L. Rev., VI, 400.
- GOVERNMENT AND JURISPRUDENCE OF THE MEXICANS BEFORE THE SPANISH CONQUEST. *R. B. Gaither*. Va. L. Rev., VI, 422.
- CONTINGENT AND IMMATURE CLAIMS IN RECEIVERSHIP PROCEEDINGS. *Ralph E. Clark*. Yale L. Jour., XXIX, 481.
- DEVELOPMENT OF PRIVATE INTERNATIONAL LAW THROUGH CONVENTIONS. *D. Josephus Jitta*. Yale L. Jour., XXIX, 497.
- PRESSENT VALUE OF COMPARATIVE JURISPRUDENCE. *C. E. A. Bedwell*. Yale L. Jour., XXIX, 509.
- COMMON LAW AND THE STATUTES. *Ernest Bruncken*. Yale L. Jour., XXIX, 516.
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CONSTITUTIONAL DECISIONS OF JUSTICE CARTWRIGHT

BY ORRIN N. CARTER

It appears not inappropriate to refer, briefly, at the outset, to the volume of the work done by Judge Cartwright on the Supreme bench. I fully realize that a judge's standing should be largely fixed, not by the quantity of his work, but by its quality. But when a judge is pre-eminent both as to quantity and quality, it is particularly fitting in these days, when courts of review have such a great mass of work and are required—if justice is at all properly administered—to keep pace with it, that we should appreciate the amount of the good work done by him. Of course everyone who has given thought to the question knows that too great haste in writing opinions in courts of review cannot bring good results; that careful study and judicial deliberation are required, rather than "breathless haste"; but a judge who can dispose of his work rapidly and yet give it the necessary care and deliberation, certainly possesses qualifications for a great judge that would not be possessed by one who might work so slowly as to fall far behind. Hence, a brief reference to the amount of work performed by Judge Cartwright, as compared with the other judges of the Illinois Supreme Court since its establishment, may be helpful in fixing his proper place in the judicial annals of the state. The librarian of the Supreme Court and his assistant have given their kind and expert aid in ascertaining the number of decisions written by the various Supreme Court judges in this state, and while the figures may not be mathematically correct, they are approximately so. Comparing the number of opinions written by the judges of the Illinois Supreme Court, Judge Cartwright stands third in order; Judge Pinckney H. Walker, who served twenty-seven years, wrote 2,304 opinions that were adopted by the court and

are found reported in 99 bound volumes of the reports; Judge Sidney Breese stands next, who, in a service of twenty-three years, wrote 1,962 cases, reported in 73 volumes. Judge Cartwright, who will by next December have served twenty-five years, has written 1,712 opinions that are reported in 134 published volumes, including the advance sheets of July 14, 1920. Approximately 150 of these opinions written by Judge Cartwright directly involve the discussion and decision of constitutional questions, the great majority construing the provisions of the Illinois Constitution, though some of them have reference to the federal Constitution, such as *Forrest v. Fey*,¹ *Booz v. Texas & P. R. Co.*,² *Chicago Railways Co. v. City of Chicago*.³ It is undoubtedly true that in amount of writing Judge Cartwright has produced a volume greater than any judge who has ever served on the Illinois Supreme Court, for the questions involved when Walker and Breese were in office were frequently very simple and quickly disposed of in brief opinions, as compared with the questions that have been before the court during Judge Cartwright's term of service. Judge Cartwright's first opinion is found in volume 160 of the Illinois reports. As his opinions are found in 134 volumes, and under the court's system of work that has prevailed during his service, he has written at least one-seventh of the cases, it can be seen that his opinions would practically fill 19 volumes of the reports, each volume containing over 600 pages. During his service he has been present at every term of court and has been away not more than four or five days, all told, during the whole twenty-five years, and then only because of the severe illness of relatives. Judge Cartwright surely has a remarkable record in keeping up his work in the court.

Another comparison may be helpful. John Marshall, the great Chief Justice of the United States Supreme Court, served on that bench thirty-four years. During that time 1,106 opinions were adopted by that court and 519 of these were written by him. Sixty-two of those decisions involved constitutional questions, of which 36 were written by Marshall—only about one for each year of his service. It is manifest, therefore, that there was ample time for careful preparation by the federal Supreme Court judges during Chief Justice Marshall's term of service. As another has said in speaking of his work on the supreme bench: "The mercantile interests of the people had not yet compelled the use by judges of an

1. 218 Ill. 165.

2. 250 id. 376.

3. 292 id. 190.

hour glass nor the substitution of citations of the latest authorities for discussion of principles." And yet a study of Judge Cartwright's opinions will demonstrate that his opinions are not simply a citation of authorities, but often contain profound discussions of the principles involved. It should also be noted in this connection that his opinions are not unnecessarily long. There is much discussion these days, in bar associations and by lawyers, as to the length and the great number of opinions that are being published and therefore the necessity, in order to keep a law library down to workable size, and for various other reasons, that the opinions of the courts of review should be as short as possible. I have thought during the years that I have served with Judge Cartwright in the Supreme Court that in view of all the varying problems connected with the subject, his opinions come as near being the ideal length as those written by any of the judges during that time—sufficiently brief not to tire one by repetition or diffuseness, and yet covering clearly the material questions in the litigation in such a way as to be a guide to the legal profession.

Judge Cartwright has often said that he has no great memory for the names and titles of cases or authorities, but those who have served with him have always noticed that if the court has ever considered a principle of law in an opinion during his term on the bench, he was very apt to remember that fact and would be able to locate closely the year when the decision was made. In some of the biographies of Chief Justice Marshall it is said that at the close of some of his great decisions Marshall would say: "These seem to me to be the conclusions to which we are conducted by the reasoning and spirit of the law. Brother Story will furnish the authorities." Judge Cartwright has told me more than once that during his service on the Illinois Supreme Court with the elder Craig (Judge Alfred M. Craig)—a judge noted for his great common sense and large experience in public affairs—Judge Craig often said in discussing cases, that it would seem that such and such ought to be the law, and then ask Judge Cartwright if he would find authorities to support such conclusions. I have always felt that a judge who was deeply grounded in the fundamental principles of law—who could state correctly without looking up the authorities what principles should be applied to a given case, and then search and find authorities to uphold those principles, was a greater judge than one who relied entirely upon so-called "case law."

Judge Cartwright's attitude with reference to constitutional law is not only illustrated in many of his decisions, but perhaps as for-

cibly and briefly as any place in his response on behalf of the court at the celebration held February 16, 1911, at the unveiling of the portraits of the justices of the Illinois Supreme Court, in the Supreme Court building at Springfield. Among other things he said:

"It has been the duty of this court to define and enforce the rules established which govern the relations of individuals to each other, to construe the written laws in accordance with the legislative intention, and, most important of all, to protect citizens in the guaranties of the constitution. In a representative government, legislative bodies are intended to be immediately responsive to the will of the majority of the people, and their acts which do not conflict with the constitution are to be upheld. If, however, the provisions of the fundamental law, adopted by the people after much deliberation, are overlooked, the court is charged with a duty, for which a solemn oath is exacted, to support the constitution. This court has performed the duties so imposed upon it through the existence of the state and under the constantly changing conditions which have marked the growth of a great commonwealth."⁴

In the very recent decision of *Sutter v. Peoples Gas Light Co.*,⁵ this same thought was set forth as follows (p. 640):

"The General Assembly is without restriction or limit in the exercise of legislative power except as bounds are set or restrictions imposed by the constitution. . . . All presumptions are in favor of the validity of a statute, and in all doubtful cases the doubt is to be resolved in favor of the law. . . . Neither the motive nor the wisdom of the General Assembly is ever questioned, but where it is clear that a limitation or restriction imposed by the people in the fundamental law has been violated or disregarded by the General Assembly or any other authority whatever, it is the plain duty of the court to so declare, and that duty can neither be evaded nor neglected in the case of an act of the General Assembly, no matter how desirable or beneficial the attempted legislation may be. The constitution is supreme, and whatever the purpose of the people may have been in imposing a restriction upon legislation it must be obeyed."

In many other decisions involving constitutional questions he has stated the same principles, and has clearly set forth the duty of the court and its proper limitations as to the authority of the various branches of the government—notably in *People v. Dunne*,⁶ where he said (p. 453):

"No more baseless and defenseless proposition could be put into words than to say that the court has ever arrogated to itself the

4. 250 Ill. p. 24.

5. 284 Ill. 634.

6. 258 Ill. 441.

authority to pass upon the wisdom or propriety of either executive or legislative acts. It has never assumed to declare laws valid or invalid because they were wise or unwise, or because they tended to advance or retard social justice, individual justice, corrective justice, or any other variety of justice. The only law made by the people is the constitution, enacted by them, under their original and sovereign power, as the fundamental law, wherein they have granted powers to and prescribed limits for each one of the several departments. It was deemed essential to the existence of the government that there should be some department authorized to construe that law, and determine, when called upon in some form known to the law, whether its limits have been disregarded. That duty rests upon the courts, and to the exercise of that function this court has always strictly limited itself. When the validity of an act of the legislative department has been in question, the constant rule has been to construe it so as to uphold its validity if it could reasonably be done, and if its construction was doubtful the doubt was resolved in favor of the law."

In these days, when the courts are so continually charged with the desire to usurp the functions of the legislative and executive departments of government, it is wise to study carefully the attitude of the various high courts upon constitutional and legislative questions. Beyond doubt, all our great judges in all their well considered opinions have taken, substantially, these same views in passing upon the authority of the courts as to legislation. Not long before his death, Chief Justice Marshall was given a reception by members of the Philadelphia bar, and in response to the tributes then expressed, he said that if he might be permitted to claim for himself and his associates any part of the kind things said that evening as to the work of the court, it would be this, that they had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required." I am sure this spirit has always animated Judge Cartwright in his long and honorable career on the bench.

No attempt can be made within the proper limits of an article such as this to review all of the constitutional opinions written by Judge Cartwright. In its preparation I have read, I think, all of them. They touch upon many different points—practically every subject that comes for settlement in these days to the courts, arising out of our complex social, industrial, and governmental problems in our metropolis and in our many cities, as well as in the rural districts of a great commonwealth like Illinois; from golf (*Condon v. Forest Park*⁷) to the most important question of state government

7. *Thayer*, "John Marshall," p. 106.

8. 278 Ill. 218.

(*People v. Lowden*⁹). A person who wishes to understand constitutional law can obtain a liberal education on the subject from a study of Judge Cartwright's decisions alone, as found in the Illinois reports. While—as any reader of this article will easily see—I am a great admirer of Judge Cartwright as a man and of his ability as a judge, I will frankly state that I have disagreed with him more than once even on constitutional questions, as will be noted from the bound volumes of the reports, and I have sometimes filed a dissent to opinions written by him and adopted by a majority of the court. I may say also in passing that I have not always publicly dissented, even though I have disagreed with him quite frequently in the conference room, for I have been greatly impressed with the statement of former Judge Jesse J. Phillips of our court, as repeated to me by Judge Cartwright. Judge Phillips was accustomed to say when he voted in conference against an opinion which was adopted touching a constitutional question, that he would not be noted as dissenting in the published reports, as he believed that the importance of the opinion and the dignity and influence of the court would be greatly lessened in the estimation of the public if dissents by a minority of the court were shown in the reports on constitutional questions. No matter how much one may agree or disagree with Judge Cartwright in his conclusions, every student of his opinions will quickly realize that he expresses himself with clearness and that his conclusions are supported by strong and persuasive reasoning. A person cannot be a great judge unless he has positive views on many public questions. "It is one thing to be impartial and another to be colorless in mind." Judge Cartwright is impartial and judicial—above the average—in his attitude on the bench, but he usually has positive views. He also possesses what all great judges must have—a constructive mind. He does not rely solely on precedents or former authorities, but can meet the new conditions and situations that continually arise before a court of last resort with such foresight and sound reasoning as to assist in promoting justice, and also make it possible to enforce, in a practical way, written constitutions, in our overlapping city, county, state, and national governments. A case forcibly illustrating his constructive ability and foresight in the solution of difficult subjects is that of *Gulf Lines Connecting R. of Ill. v. Golconda Northern R.*¹⁰—a long and complicated litigation between competing railway lines where both wished to have their right of way located through a pass bordering on the Ohio river, and

9. 285 Ill. 618.

10. 290 Ill. 384.

where the geography of the country was such that only one railway could be located. The final settlement of the dispute, as laid down in the opinion of the court written by Judge Cartwright, has always seemed to me as original, practical, and fair as any possible solution could be. His same foresight and fine judgment is shown in the opinion in *People v. County of Williamson*,¹¹ as to the responsibility of the various public authorities in building bridges on the county lines. Another case that shows his peculiar ability to state clearly, in settling in a practical way without overriding any of the provisions of the constitution the problems that often come before the court, is shown in *People v. Rodenburg*,¹² where he discusses and sets forth the law as to the power of municipalities to establish city courts, and draws what might seem to be some very fine distinctions in holding that the law in question was constitutional, but also holding that the city court in question was illegally established. In this opinion he shows in a remarkable way one of his outstanding qualifications in being able to so state his conclusions as to draw very nice distinctions and yet make clear to others the distinctions that are made. When necessary he can

“ . . . distinguish, and divide
A hair 'twixt south and southwest side,”

and yet make the distinction so plain that other people can see it. It requires a master mind to perform this feat.

Another question that has come with frequency before the Illinois Supreme Court has to do with class or special legislation. The court has scores of decisions on the subject and Judge Cartwright has written many of them. One of the first opinions written by him discussing that question was *Harding v. People*,¹³ where he said (p. 465):

“Each person subject to the laws has a right that he shall be governed by general public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others. . . . Any reason that would apply to one, calling for a restriction upon the manner of doing business, would be equally applicable to the other, and special burdens and restrictions upon one class not imposed upon the other constitute an arbitrary deprivation of rights.”

11. 286 Ill. 44.
12. 254 Ill. 386.
13. 160 Ill. 459 .

Among other cases in which he wrote the opinion touching this question are *Sanitary District v. Bernstein*,¹⁴ *People v. Sayer*,¹⁵ and *Rogers v. Carterville Coal Co.*¹⁶

One of the many fundamental questions that arise in the application of both the federal and state constitutions is with reference to "due process of law." In some of Judge Cartwright's opinions he has discussed this question with his usual clearness and force, including *Green v. Red Cross Medical Service Co.*,¹⁷ *Chicago v. Wells*,¹⁸ *People v. Strassheim*,¹⁹ *People v. Lower*,²⁰ *C. B. & Q. R. Co. v. Cavanagh*,²¹ *Utilities Commission v. City of Dixon*.²² The question of the government's authority under the so-called police power, a power which the Supreme Court of this state has often called the "law of overruling necessity," is continually before the courts for consideration, and on this subject Judge Cartwright has written many illuminating opinions, among others being *Stead v. Fortner*²³—which is another fine illustration of his constructive ability—also *Metropolitan Insurance Co. v. People*,²⁴ *Block v. City of Chicago*,²⁵ *Chicago v. Kluever*,²⁶ *Catholic Bishop v. Palos Park*,²⁷ *People v. Kane*,²⁸ *People v. C. C. C. & St. L. R. Co.*,²⁹ *Chicago Railways Co. v. City of Chicago*,³⁰ *Integrity Mutual Ins. Co. v. Boys*.³¹

Perhaps no more important question as to the proper administration of justice in the courts ever comes up for consideration than the standard of ethics for the legal profession, as applied to admission to the bar and in disbarment proceedings. I am disposed to think the one opinion found in the books which gives the most exhaustive consideration to the fundamental principles involved in those questions, and the most comprehensive and well considered discussion of the whole subject, was written by Judge Cartwright, and is entitled *In re Day*.³² This decision is perhaps quoted on

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- 14. 175 Ill. 215.
 - 15. 246 id. 382.
 - 16. 254 id. 104.
 - 17. 232 id. 16.
 - 18. 236 id. 129.
 - 19. 242 id. 359.
 - 20. 251 id. 527.
 - 21. 278 id. 609.
 - 22. 292 id. 521.
 - 23. 255 id. 468.
 - 24. 209 id. 42.
 - 25. 239 id. 251.
 - 26. 257 id. 317.
 - 27. 286 id. 400.
 - 28. 288 id. 235.
 - 29. 288 id. 523.
 - 30. 292 id. 190.
 - 31. 293 id. 307.
 - 32. 181 id. 73.

this subject as often as any other authority in this country or Great Britain. In this connection it is appropriate to say that in recent years, since legal publishing houses have been preparing and editing volumes of "leading cases" devoted to standard and fundamental principles of law, Judge Cartwright's opinions have probably been as frequently printed in them as those of any judge of any state court in the country. One of the leading publications of this kind is American and English Annotated Cases, which began in 1904 and continues to the present time. More than a score of Judge Cartwright's opinions on leading questions are found in that work, and the same general proportion, I believe, holds good in every like publication in the country.

Judge Cartwright has another outstanding quality that makes him able to see the turning or crucial point in a case with wonderful quickness and accuracy; as an arrow speeding to its mark, he can distinguish—seemingly almost by intuition—the deciding point in the case, no matter how complicated, and he can express his views in clear and unmistakable terms on the law and facts. He possesses—perhaps more than any other judge with whom I have been associated on the bench—the ability to announce an oral decision so accurately that if taken down in shorthand it can be published with very few changes, and yet in such a way that it covers practically all the points involved so clearly as not to mislead. A decision in a case involving great constitutional questions cannot usually be written within a few hours; but Judge Cartwright's power of expression and great knowledge of constitutional law make it possible for him to write very expeditiously. I have heard him say that he wrote the opinion in *People v. Rose*,³³ involving the constitutionality of an act establishing new judicial circuits in the state, in one night, because it was an emergency matter that must be decided before the court should adjourn the next morning. In reading that opinion, no one, I think, will notice any marks of haste in its arrangement or wording.

Ever since my association with him on the bench began I have been more and more impressed with his practical common sense and farsightedness in deciding the many complicated questions that have come before us. As I have read and studied again his opinions on constitutional questions in preparing this paper, the thought has often recurred that they demonstrate the truth of the statement made by that former leader of the American Bar, Joseph H. Choate, that

33. 166 Ill. 422.

"Law is the expression and the perfection of common sense," as well as one made long ago by Coke, that great lawyer of olden days, when he said "Reason is the life of the law; nay, the common law itself is nothing else but reason."³⁴ Our Illinois Supreme Court has, in my judgment, continuously kept in mind these truths, and has tried to apply the same principles to the ever changing conditions of civilization; as Judge Cartwright, himself, has said in the address heretofore quoted—

"This court has been required to keep pace with the rapid growth of the state. Beginning with the simple questions arising between the settlers concerning their rights, it has sought to apply the same principles of right and justice to the many questions arising from more complex conditions and the restless energy of a great people, as well as from new legislation. While the principles upon which justice is administered have always been the same, no two sets of circumstances are precisely alike and the growing complexity of social conditions often renders their application difficult, but the court has sought to select and apply such rules as would accomplish justice in each case. The work has not been perfect, as no work of human hand or brain is perfect, but it has never been questioned that the motives have been pure and that there has been a conscientious effort to fulfill the high mission of establishing and maintaining justice. So far as there are imperfections, they fade away with maturer judgment and consideration, and that which is in accordance with the eternal principles of right endures."³⁵

I am confident that more and more, as the years pass by, the leaders of the bench and bar of this state will rank the opinions of Judge Cartwright along with those of Scholfield, Breese, Lawrence and our other great judges, and that judges and lawyers the country over will frequently consult and quote from his opinions, particularly on constitutional questions, as among the most profound, the clearest, and sanest written.

34. Institutes, 97b.

35. 250 Ill. p. 25.

SOME INTERESTING CASES DECIDED BY JUSTICE CARTWRIGHT

BY GEORGE PACKARD

It is a matter of considerable moment in the annals of Illinois jurisprudence that one of its Supreme Court justices celebrates next January the twenty-fifth anniversary of his service on that bench. A quarter of a century of continuous activity on a great court, covering a period of mighty achievement in the march of affairs, is recorded in one hundred and thirty-two volumes of our Supreme Court Reports, commencing with Volume 160. James H. Cartwright was elected December 17, 1895, to fill the unexpired term of Joseph M. Bailey, deceased. He took his seat January 2, 1896. Alfred M. Craig was Chief Justice, and the other members of the bench were Justices Magruder, Baker, Wilkin, Phillips, and Joseph N. Carter—a court of great ability, all will agree, in which to cradle and train the new recruit, who was then in his fifty-third year. During the ensuing year Mr. Justice Cartwright became a power—a rock of authority—a spokesman of legal common sense. His opinions are conspicuous for their bluntness, their lack of ostentation, their downright fearlessness and directness of purpose. No one ever had to reread his sentences in order to get at his meaning. He is a disciple of the short opinion—a grateful reversion to the ways of the early English reports. Rarely do they exceed three pages, except in cases of unusual importance. Display of legal learning—which can only have for its practical result the gratification of the pride of winning counsel—is quite absent. It is impossible to read these trenchant, brief, well-considered pages, without a conviction that they speak the personality of a great, downright, plain, forceful character, typical alike of the state and of the time in which he was born, and unaffected by the changing influences of a modern and more superficial age.

Justice Cartwright's first Supreme Court opinion is in *Oeltjen v. The People*,¹ passing on the liability of the sureties on a county treasurer's bond. His first criminal decision is *Goon Bow v. the People*.² His first constitutional utterance is in *Harding v. The*

1. 160 Ill. 409.

2. 160 Ill. 439.

People,³ on the subject of what constitutes due process of law, what is within the police power, and what is class legislation.

It is a matter of no small embarrassment to select the most interesting opinions from the enormous output of this untiring judge. Those opinions which have to do with constitutional questions are left out of account, as they are elsewhere discussed. So that the few cases that are to be treated here are such as have a general appeal to human and public interest, and I leave untouched the great body of his decisions that are of interest principally to the parties affected thereby, rich in ruling law though they may be.

First in importance are what are known as the *Lake Front* cases. Three of these, *Bliss v. Ward*,⁴ *Ward v. Field Museum*,⁵ and *South Park Commissioners v. Ward & Co.*,⁶ were decided by opinions of Justice Cartwright. In *Bliss v. Ward*, the Circuit Court of Cook County had enjoined at the instance of Montgomery Ward, the erection of an armory in Grant Park, east of the Illinois Central right of way, and between Randolph and Monroe streets extended. The Supreme Court had previously determined that no buildings could be placed west of the Illinois Central right of way, except certain excepted structures already there. Justice Cartwright reviews the previous decisions both of this court and of the United States Supreme Court with reference to this much litigated battle ground, and the completely developed law of riparian rights which had settled that the shore owner had no right to increase his boundaries over submerged land without the consent of the state which holds the submerged land in trust for the people, the shore owner's rights being confined to access to the water, and natural accretions. But the city had been permitted, as the justice points out, to fill in east of the tracks and so extend the park.

"The city received the title dedicated by the United States and the state, in both subdivisions, in trust for the public use, and has been allowed by the state to extend the park by artificial means. The ground dedicated fronted on Lake Michigan, and the property owners on Michigan Avenue bought their lots with the distinct understanding that there should never be any building between their lots and the lake. . . .

"We are of the opinion that when the limits of the park were extended into the lake, no right was acquired to erect buildings between the lots and the lake although at a greater distance from the lots, and

3. 160 Ill. 459.

4. 198 Ill. 104.

5. 241 Ill. 496.

6. 248 Ill. 299.

that the park, as extended between the lots and the lake, is subject to the same conditions and limitations as the original dedication."

With irrefutable logic the court then proceeds to construe the various acts relating to the lake front park, showing that they constitute merely the assent of the legislature to the action of the city in extending the park over the submerged land. The court then demolishes the more or less prevalent conjecture that there is some subtle difference between artificial accretions with the express or implied assent of the state, and those made by the natural action of the elements, thus:

"If the park were extended by natural accretions no one would deny that the whole would be subject to the same conditions and limitations annexed to the original dedication, and where the city has been permitted, as the owner in fee, to extend it by filling in the shoal waters along the shore line, we are unable to see how any different rule can prevail. In either case the extension grows upon the original park and becomes corporate with it and part of it—in the one case by natural process, and in the other by artificial means, with the assent of the state."

The action of the lower court was affirmed.

In *Ward v. Field Museum*,⁷ Justice Cartwright again reviews the long controversy between Montgomery Ward and the public authorities as to the placing of buildings upon the lake front. The contention in this case had narrowed itself to whether or not the restrictions could apply against such buildings as are proper to be placed in a public park. But Justice Cartwright insists that this question had in effect been answered in the other suits—where it had been held, not that park buildings, museums or any particular kind of building could be erected on the lake lake front, but that no kind of building whatever could be erected.

Again, and finally, Justice Cartwright puts the finishing touch on the much contended question in *South Park Commissioners v. Ward & Co.*⁸ In the persistent attempt to gain for the public the advantage of having the Field Columbian Museum and the Crerar Library placed on this accessible public land, proceedings had been begun to condemn the troublesome easement which the original dedicators of the park had created, in order to provide space for these structures. Judge McSurely, below, had dismissed the petitions for condemnation, and his action was appealed from. Justice Cart-

7. 241 Ill. 496.

8. 248 Ill. 299.

wright refuses as before to consider whether the buildings proposed are germane to ordinary park uses, and says:

"If the only rights which the defendants have consist of easements, in connection with their property, of an unobstructed view, and such easements can be taken from them by condemnation, it is not material to them what the uses of the building are."

The court then expounds the principle that a *lawful* public use lies at the foundation of the right to acquire property by condemnation, and the legislature may not authorize the taking for an illegal use—the courts being the judges of the unlawfulness. And if there is a want of power to appropriate private rights to a particular use, there can be no condemnation of such rights.

"If the legislature had no power to change the uses of Grant Park and to disregard the terms of the dedications by authorizing the erection and maintenance of buildings in the park, there could be no condemnation of the rights of the defendants that the park should be kept free from buildings, whatever the nature of such rights might be. It is not thought that the state can divest itself of the right of eminent domain to take private property for public use, but the settled law of this state is that if the owner of private property offers to donate it to the public for a specified public use, and the offer is accepted and the property devoted to such use, the state cannot change the use and apply the property to some other use inconsistent with the dedication. Grant Park is already devoted to a public use, and the only question to be decided is whether that use can be changed."

Much as a resident of Chicago mourns the loss of these two great improvements to the convenient accessibility of the general public—a loss far greater in extent than anything Montgomery Ward could have suffered by this kind of infringement of his unobstructed view—it is impossible to escape from the logic of Justice Cartwright's position. Cases are cited showing—

"That an owner making a donation of his land to the public for a particular use has a right to specify the use and impose restrictions, and if the dedication is accepted, the land cannot be applied to any other use, or the restrictions disregarded."

The court also insists that the question was *res judicata* in the former suits, on the theory that the principle extends to every other matter which might have been raised and determined therein. When the injunction in favor of Ward was allowed, if it had been limited to the time when his damages should be ascertained and paid, it was his duty to raise such position then. But the injunction was made permanent, and all questions that might have been raised were determined adversely—and determined that there was no lawful

authority for the erection of buildings in Grant Park—and hence no law authorizing the condemnation of property for that purpose.

The decision was four to three. Mr. Justice Dunn in a long dissenting opinion gives seemingly excellent grounds for a decision the other way. But, after all, perhaps we citizens of Chicago should be grateful to Judge Cartwright that the law is logically announced to protect the barest rights of a single property owner—albeit, a most obstinate customer—against the all too prevalent theory that private rights must be made to bow to the organized force of a determined public opinion that has for its foundation the trampling of such rights in the interests of a supposed greater good, without legal ground to support it.

We turn now to what this writer regards as the most telling opinion ever given by Mr. Justice Cartwright—an opinion that adds materially to the claim of greatness for our Supreme Court. I refer to *People v. Mayor of Alton*.⁹ Seven times a jury on an issue of fact had had before it in mandamus proceedings the right of a colored citizen to send his children to the most convenient public school. The evidence conclusively showed that the exclusion “was solely on account of their race and color and for no other reason whatever.” An original petition was finally filed in the Supreme Court, and issues of fact were submitted to a jury thereon which were tried in the Circuit Court of Marion County.

“It is beyond dispute,” says Justice Cartwright, “that this verdict when viewed in the most favorable light for the respondents, does not represent any conclusion of the jury from the evidence, and that all of the verdicts represent nothing but a refusal by juries to enforce a law which they do not personally approve, or which is distasteful to them. . . .” “It is no less the duty of courts to enforce the law as it stands, without respect to race or persons. We would be remiss in our duty to enforce the law and would forfeit the respect of all law-abiding citizens if we would approve this verdict for no other reason than because it is one of a series which represent, not the enforcement of law or the discharge of duty, but a deplorable disregard for the law and for the rights of citizens. The verdicts have all been more offensive and dangerous assaults upon the law, the government and organized society than the utterances of individuals or societies who are opposed to all law, and which are regarded only as the sentiments of the ignorant, depraved and vicious who are the enemies of a government of laws. These verdicts were pronounced not by those who were avowed enemies of law and government, but by those who constituted a part of the governmental machinery for the enforcement of the law and who had been sworn to discharge their duty in that regard. Such verdicts not only denote opposition to the enforcement

9. 233 Ill. 542.

of the law, but they also jeopardize the highest interests of society and individuals. When the law, through the refusal of jurors to regard their oaths, becomes impotent to protect the rights of the humblest, the rights of no person are secure; and jurors may take heed that they obey and enforce the law, lest their refusal to enforce the law for the protection of others becomes effective to deprive them of their legal rights and substitute the beliefs of jurors and courts as to the wisdom of laws enacted for their protection."

The court then takes the matter in its own hands, says there is no provision any way, for a reference to a jury in original proceedings in the Supreme Court, and, in the opinion of Mr. Justice Cartwright, concurred in by a majority of the court, the rights of the wronged citizen were of more value to be sustained than the doubtful practice of referring the facts to a county jury, which the minority of two members of the bench contended for. Justice Cartwright goes on:

"In this case the effort to obtain a fair trial of the issues of fact before a jury has proved utterly futile, and upon the trial now under review the court refused to direct a verdict in passing on a question of law raised by the motion of the relator for such a direction. It is clear that after so many trials there can be no further evidence produced by either party, but that all the evidence relating to the issues is before us. We are of the opinion that it would be a wrong to the relator to further delay him in establishing his rights and to compel him to add to the trouble and expense already incurred in an effort to compel obedience to the law. The verdict of the jury is set aside, and the issues will not be again certified to the Circuit Court for trial but will now be finally disposed of."

The writer can only say that this is the act of a fearless, high-minded and upright court. A greater principle was at stake—a principle far weightier than any mere matter of procedure—the right of a citizen who was a victim of the greatest scandal of our history—race-prejudice. It was plain that only in that way could justice be done. And justice *was* done, to the honor of our Supreme Court. Nothing but rank prejudice intervened to prevent the enforcement of one of the fundamental principles of liberty on which this government is founded. Mr. Justice Cartwright took the only course that was open to preserve that principle—boldly and bluntly, as is his wont.

In *Wilson v. Hey*,¹⁰ *Barnes v. Typographical Union*,¹¹ and *Barnes v. Typographical Union*,¹² Justice Cartwright renders some

10. 232 Ill. 389.

11. Id. 402.

12. Id. 424.

interesting decisions on the ever mooted subject of capital and labor. Now, when the arrogance and power of organized labor are being asserted as never before in the history of the world, when the public is being mulcted by that side in the eternal controversy in worse degree than ever it was by capitalistic greed in the palmy days of the famous Vanderbiltian aphorism, it is extremely interesting to notice the position taken by our Supreme Court, speaking through Justice Cartwright.

In the first case mentioned, the principle of the boycott was involved. A firm engaged in teaming, storage, and also in operating a public hall in Sparta, Illinois, had been in the habit of employing whomsoever they desired, without reference to their union affiliations. A species of petty annoyances from a number of unions began, ending in the Wilsons being put on the "unfair list," and notification given quite widely. There was no threat, but it was understood by various parties who received the notice that their business would be injured and their trade withdrawn unless they complied with it. The appellants were enjoined from putting the Wilsons on this "unfair list." The opinion says:

"The right of laboring people to organize for the purpose of promoting their common welfare by lawful means is fully recognized. They may refuse to work for any particular employer, and may obtain employment for their members by solicitation and promises of support in trade or otherwise, but in the accomplishment of their purpose they must proceed only by lawful and peaceable means and they have no right to make war on other persons. It is not wrong for members of a union to cease patronizing anyone whom they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person. Such means as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another, are wrong and unlawful. If the notices given or things done have the natural effect of exciting such reasonable fear and apprehension and accomplish the result intended, it is immaterial that they are not accomplished by direct threats."

It was held that the injunction was proper, inasmuch as its purpose and effect was to establish a boycott.

Unless a person's mind is warped with proletarian partisanship, it would be difficult to quarrel with this position—any more than with the removal by the police of a gun from the hands of a somewhat obstreperous citizen on the street who was attempting to better his condition in life by using it.

In the first *Barnes* case mentioned¹³ the picketing question was involved, a number of printing firms having obtained an injunction against Chicago Typographical Union No. 16 to prevent picketing their premises, interfering with employees, and soliciting them to leave this service. An appeal was prayed from the injunction, and pending the appeal, the defendants continued in the acts enjoined, and two were fined, who appealed. Justice Cartwright says:

"The question being by what court the contempt can be punished, the material answer would be, by the court whose order is disobeyed, and whose dignity and authority are defied—the contention having been made that a perfected appeal stayed the operation of the injunction.

"If the court should be denied the right to compel obedience to the prohibition of the decree until the original case has completed its rounds through the courts, the appellees might lose all the benefits of their litigation and have their business ruined, although the decree should finally be affirmed. We are not prepared to adopt or declare such a doctrine."

But in the other *Barnes* case¹⁴ the merits of the same controversy were involved; and the injunction that was issued on the demurrer to bill was under scrutiny, the broad question being whether injunction was the remedy for the acts set out in the bill, which, it was claimed, were within lawful right. The following very reasonable statement of the law is made by Mr. Justice Cartwright:

"It is not claimed that an injunction was not the proper remedy if the acts of the defendants were without lawful right, but it is argued that there was nothing unlawful about what was done, because it was done in the course of labor competition for the promotion or welfare of union laborers. The controversies between labor unions and employers have occasionally developed some curious and unusual notions of what constitutes competition, but they have never been generally adopted and have not been approved by the courts. It is true that competition in business justifies action for the benefit of one of the competing parties which results in injury to the other, and a reason frequently given is that the general public benefits outweigh occasional individual losses. One who is seeking employment for himself may offer to work on any terms that he may choose, and the exercise of his legal rights may result in the discharge of another laborer. But that rule does not apply to this case. It is not very clear what is meant by competition for the purpose of promoting the welfare of the union and its members, but it is clear that the union and its members were not in competition with the complainants in respect to labor or anything else. The members of the union had left the service of the complainants, and their only purpose was to pre-

13. 232 Ill. 402.

14. 232 Ill. 424.

vent the complainants from carrying on their business. They were endeavoring to compel the complainants to submit to their dictation by depriving the complainants of their legal right to employ such laborers as they might choose. If there is a combination to injure a person because he refuses to comply with some demand where he has a legal right to refuse, there is no way of classifying acts in furtherance of such purpose as competition. The acts alleged in the bill were directed primarily against the complainants for the purpose of doing them harm, and that sort of action is not lawful competition. . . .

"The whole scheme as set out in the bill was to injure the complainants for the purpose of compelling them to yield to the union their absolute legal right to manage their own business in their own way."

On the point that the terms of the injunction were too broad because it prohibited peaceful picketing, the opinion reads:

"The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing, by a labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer, it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainant's premises was in itself an act of intimidation and an unwarrantable interference with their rights. Pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance."

In other words, the opinion holds that the warfare between capital and labor cannot be conducted with any different results, so far as the law is concerned, from any other kind of breach of the peace. If you must fight with your supposed enemy, the law is at hand to protect him, as well as the public, from the annoyance that ensues. When Justice Cartwright says:

"The law allows laborers to combine for the purpose of obtaining lawful benefits for themselves, but it gives no sanction to combinations, either of employers or employed, which have for their immediate purpose the injury of another,"

he states in one trenchant sentence the sound, conservative, doctrine that alone can keep the law in respect, and preserve the institutions of this country from utter demoralization.

The limits of this article do not permit comment on other important and interesting decisions of Mr. Justice Cartwright, such as *Ostrander v. Scott*,¹⁵ on accord and satisfaction; *Gage Hotel Co. v. Union National Bank*,¹⁶ as to the inability of the drawer of a check to stop payment after he has parted with his title; *In re Day*,¹⁷ declaring the Act of 1899 as to admission to the bar unconstitutional, on the ground that the power to prescribe qualifications is judicial and not legislative; *Lightcap v. Bradley*,¹⁸ regarding the rights of mortgagors when the mortgagee neglects to take out deed within the statutory period; *Union Strawboard Co. v. Bonfield*,¹⁹ announcing a public policy of the state distinct from the United States, as applied to contracts which deny to a citizen the right to do business within the state; *Gunderson v. Illinois Trust and Savings Bank*,²⁰ to the effect that a de facto corporation, as to third persons, is as effective as a de jure corporation; *Garden City Sand Co. v. American Refuse Crematory Co.*,²¹ as to the liabilities of purchasers of full-paid and non-assessible stock; *Springer v. Borden*,²² involving the method of revaluing premises under a ground lease; *Osgood v. Skinner*,²³ on option contracts; *C. R. I. & P. R. Co. v. Hamler* as to liability of the railway for injuries to a Pullman porter; the sensational murder case of *Hoch v. People*,²⁴ *Caraway v. Sly*,²⁵ as to the effect of a deed intended as a mortgage; *Walsh, Boyle & Co. v. Bank*,²⁶ as to rights of a bank under a bill of lading and sight draft; *Edwards v. Schillinger*,²⁷ concerning suits in equity by bankruptcy trustees to enforce stockholders' liability in a non-resident corporation; *Garrity v. Eiger*,²⁸ as to the liability of owner of premises under the dram shop act; *City of Chicago v. Lord*,²⁹ the Twelfth Street Boulevard Improvement case; *Ryerson v. Shaw*,³⁰ as to right of foreign corporations to use our courts; *People v. Day*,³¹ holding void a large part of the tax levy of 1915;

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- 15. 161 Ill. 339.
 - 16. 171 Ill. 531.
 - 17. 181 Ill. 35.
 - 18. 186 Ill. 510.
 - 19. 193 Ill. 420.
 - 20. 199 Ill. 422.
 - 21. 205 Ill. 42.
 - 22. 210 Ill. 518.
 - 23. 211 Ill. 229.
 - 24. 219 Ill. 265.
 - 25. 222 Ill. 203.
 - 26. 228 Ill. 446.
 - 27. 245 Ill. 231.
 - 28. 272 Ill. 127.
 - 29. 277 Ill. 397.
 - 30. 277 Ill. 524.
 - 31. 277 Ill. 543.

Dunn v. Chicago Industrial School,³² as to religious instruction accorded delinquents at this institution being non-violative of the constitution, and *City of Chicago v. Farwell*,³³ the *Kirk Soap Co.*'s case arising out of the construction of the boulevard link. In this latter case, in reply to the contention that there was something special in the soap business that took it out of the market-value rule, Justice Cartwright uses this picturesque language:

"The development of an industry from the housewife's ash-leach and soap-kettle in the back yard to the great soap factory, or from the smoke-house and annual butchering to the immense plant of the packer, or from the vinegar barrel to the factory, does not change the nature of things, and there is nothing about making soap which renders the business peculiar or different from any establishment where a household necessity is made. It requires no franchise to make soap, and a factory making large quantities of soap and established forty years is not different in its nature from a small one established yesterday. There being no evidence offered or available to bring the soap factory within an exception to the established rule of law, the court did not err in the holding."

Somehow there is something suggestive and characteristic of Justice Cartwright's personality in these words. The linking of the past with the present—the detection of change in fundamentals only in degree, despite the complexity and hugeness of modern conditions, is indicative of a mind ideally equipped to carry forward into this changing world the eternal principles that make for justice, and which do not change. Such was and is Judge Cartwright.

A reference to some of the interesting opinions of Justice Cartwright should not be closed without adverting to *Chicago Railways Co. v. City of Chicago*,³⁴ where the legislative control of street-car fares through the Public Utilities Commission is definitely asserted, against the contentions of the city administration, which from purely political motives is making a football of our traction service, and holding up the financial integrity of great enterprises to the scorn and derision of the investing world. Says Judge Cartwright:

"The General Assembly has the power, and is charged with the duty to see that rates of fare in the use of streets are reasonable, within the limit, on the one hand, of a fair return to the railway company, and reasonable compensation for the service rendered, and the interest of the city cannot affect that power and duty."

Again:

32. 280 Ill. 613.

33. 286 Ill. 415.

34. 292 Ill. 190.

"As the streets are for the use of all citizens of the state, the question of rates of fare is not one of local concern, merely, or of local politics. . . .

"If the five-cent fare fixed by the contract, and determined to be still reasonable and proper on April 25, 1919, was just to the parties, it is beyond question that it was not just and fair after the operating expenses had been very greatly increased."

It would seem to be difficult for any fair-thinking man to dispute the logic of this position. It is only to be hoped that a more thorough understanding of the situation, so lucidly expressed by Judge Cartwright, may be soon brought home to the voters, so that a change in the city's attitude towards this important element of civic prosperity may be demanded.

At the unveiling of the portraits of former Supreme Court justices in February, 1911, Mr. Justice Cartwright said:

"It has been the duty of this court to define and enforce the rules established which govern the relations of individuals to each other, to construe the written laws in accordance with the legislative intention, and, most important of all, to protect citizens in the guaranties of the constitution."

No one may read through the vast body of Justice Cartwright's decisions during the quarter-century of service without a profound conviction that he has lived up to this duty—a duty which has assumed, throughout his long and upright career, something of the spirituality of an ideal. It is good for the court, for the state, and for the enduring principles of representative government, that his sturdy manhood continue to adorn our jurisprudence for many years to come.

THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AS APPLIED TO SUITS FOR DIVORCE

BY JOHN T. RICHARDS

The opinions of Mr. Justice Cartwright, reported in the Illinois Supreme Court Reports, reveal him as a great lawyer, a profound student, and a learned judge. In his years of service to the state he has brought to bear upon every question presented for his consideration all the force of a great mind guided always by sound principles of jurisprudence, of which he is a consummate master. These opinions cover a great variety of subjects, and evince not only a thorough acquaintance with the foundations upon which our systems of law and equity have been erected, but they also abound in concise, clear, and comprehensive presentations of the rules applied, leaving no doubt in the mind of the reader as to the meaning intended to be conveyed.

A single instance will serve to illustrate the truth of this statement, although many others might be cited as proof of its correctness. Because of its bearing upon the subject of this paper, attention is called to the case of *Forrest v. Fey*,¹ which involved a question affecting the validity of a decree of divorce entered in the state of Arkansas. The facts in the case were, briefly, as follows:

A husband who resided with his wife in Illinois, left her, and took up his residence in Arkansas, the wife continuing her residence in the former state. Some time thereafter he brought suit in Arkansas against the wife for divorce and obtained a decree on constructive or substituted service of process. He subsequently married in Arkansas, and thereafter died in that state owning lands in Illinois. The Arkansas wife brought suit in the Circuit Court of Ford County, Illinois, praying that dower in these Illinois lands be assigned to her as the widow. The claim for dower was contested by the children of the first marriage and their mother, who contended that the decree of the Arkansas court was invalid for the reason that the notice given was insufficient, and that the court was without jurisdiction to enter it. The Circuit Court sustained

1. 218 Ill. 165.

the contention of the children and their mother, holding the Arkansas decree void on account of the failure of the complainant in the divorce proceeding to comply with the requirements of the law of Arkansas necessary to give the court jurisdiction to enter the decree. The petitioner then appealed to the Supreme Court, where the decree of the Circuit Court was affirmed.

The opinion of the Supreme Court was written by Judge Cartwright, and lays down certain maxims which may be relied upon as an unfailing guide in the determination of questions affecting the validity and admissibility in evidence in Illinois of a decree of a court of a sister state. Judge Cartwright's statement of the principles which control is so simple, concise and lucid that it cannot be misunderstood. While no mention is made of the full faith and credit clause of the federal constitution, the rules which govern in such cases in Illinois are plainly set forth in the following extracts from the opinion:

"Whether the allegations of his bill of complaint or the proofs to sustain them are true or false, does not affect the validity of the decree if the court had jurisdiction to enter it.

"Where a transcript of a decree entered by a court of another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except questions of jurisdiction, including fraud affecting the jurisdiction or the discretion of the court to exercise such jurisdiction.

"After a court has acquired jurisdiction its findings are conclusive in all collateral proceedings."

If the court which entered the decree had jurisdiction, such decree—

"has the same effect in every other state as in the state where it was rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened.

"In the absence of jurisdiction to pronounce a decree, it is absolutely void, and may be attacked either directly or collaterally.

"When a court of general jurisdiction proceeds to adjudicate a cause, there is a presumption of jurisdiction, but this presumption applies only when the record is silent upon the question.

"If there is an affirmative showing in the record that there was no jurisdiction, the judgment or decree will be void.

"When the decree is silent as to the jurisdiction of the court over the defendant, if there is no evidence showing that the jurisdiction was not acquired, it will be presumed that the court had jurisdiction.

"When a decree is silent as to the service of process, and the summons in the case shows want of or insufficient service, the presumption of jurisdiction is overcome.

"If it appears from the whole record in a case that the court did

not have jurisdiction, the presumption in favor of jurisdiction is overcome.

"When the record itself shows a service which is insufficient and there is no finding from which it may be presumed that there is another service, the presumption in favor of jurisdiction is rebutted.

"Where the record shows that notice was not given as required by law, the jurisdiction does not attach."

If the foregoing maxims are kept in mind, lawyers and judges will have little difficulty in determining whether the foreign decree is entitled to full faith and credit in the courts of Illinois.

The construction placed upon the "full faith and credit clause" of section 1 of Article IV of the Constitution of the United States by the federal Supreme Court has led to much confusion in the minds of lawyers and judges, as to the marriage relation in particular, and, in a less degree, as to property rights; but in every case it will be found that the difficulty has involved some question relating to the jurisdiction of the court either as to the subject matter or the person.

A few years ago the bar of the whole country was thrown into confusion by the decision of the Supreme Court of the United States in the case of *Haddock v. Haddock*,² in which it was held that the domicile within the state of one party to the marriage is not sufficient to give to the courts of that state jurisdiction to enter such a decree of divorce against a non-resident defendant who did not appear in the case, and upon whom constructive, or substituted service, only, was had, as will be enforceable in all other states by virtue of the full faith and credit clause of the constitution.

In the *Haddock* case the parties were married in the State of New York, but never lived together; shortly after the marriage took place, in 1868, the husband removed to the State of Connecticut, where he continued to reside, and there instituted proceedings for divorce some thirteen years after he became a resident of that state. The laws of the State of Connecticut as to service by publication were complied with, but the defendant made no appearance in the case, and in the year 1881 a decree was duly entered by the court granting to the complainant an absolute divorce. The wife continued to reside in the State of New York, and in the year 1899 sued the husband in New York for divorce from bed and board and for alimony, and obtained personal service upon him in that state. In his answer the defendant in the New York case, among other defenses, set up the decree granted to him by the Connecticut court.

2. 201 U. S. 562.

Upon the trial of the New York case a duly authenticated copy of the record in the Connecticut case was offered in evidence on behalf of the defendant, but was excluded on the ground (1) that the Connecticut court had not obtained jurisdiction of the defendant in that case, and (2) that the ground upon which the Connecticut decree was obtained (desertion) was false; the New York court thereupon granted to the wife a decree of separation and alimony. The decision having been affirmed by the New York Court of Appeals, the case was taken by writ of error to the United States Supreme Court, where the decision of the New York Court was affirmed in a very elaborate opinion written by Mr. Justice White, with whom four of the justices concurred; Justices Brown, Harlan, Brewer, and Holmes dissenting. Justices Brown and Holmes each wrote a separate dissenting opinion.

The only federal question involved in the *Haddock* case was whether the jurisdiction of the Connecticut court was such as to entitle its decree to full faith and credit in the State of New York, under section 1 of Article IV of the Constitution of the United States.

In that case, Illinois is included by the learned judge along with Rhode Island, Missouri, California, Iowa, Kentucky, and Tennessee as states which, "although not actually so deciding, yet lend themselves to the view that ex parte decrees of divorce rendered in other states would receive recognition by virtue of the due faith and credit clause." While this statement is in the main correct, important elements are omitted. The courts of Illinois will not give to the foreign decree full force and credit if it be shown that the jurisdiction of the court which entered it was acquired through fraud, for as stated by Judge Cartwright in the case of *Forrest v. Fey*, "questions of jurisdiction including fraud affecting the jurisdiction" are open to inquiry. This same rule was laid down by the court in the case of *Dunham v. Dunham*,³ where the court said "it is the duty of the applicant in an ex parte proceeding for divorce, on pain of obtaining an invalid decree, to avoid practicing any deception on the court in any matter affecting its jurisdiction or its discretion to proceed, or not, to the final determination of the cause." The Supreme Court of Illinois, in the *Dunham* case, held the decree of the South Dakota court void because the complainant went to South Dakota for the purpose of obtaining a divorce, and was not a bona fide resident of that state at the time her suit was

3. 162 Ill. 589.

brought, and was also guilty of fraud upon that court affecting the discretion of the court to proceed to a determination of the cause.

If the party instituting a suit for divorce falsely claim a domicile in the state where the suit is brought, a decree entered in such suit would, under the doctrine laid down by Justice Cartwright in the case of *Forrest v. Fey*, be held void on account of fraud affecting the jurisdiction of the court over the complainant. To the same effect see also *Dunham v. Dunham*, and *Field v. Field*.⁴

An examination of the adjudicated cases indicates that the conflict between them is due to the fact that courts which have refused to recognize as valid decrees entered in a sister state, and valid in such state, hold that a suit for divorce is a proceeding in personam, while courts which hold a contrary view have held such cases to be proceedings in rem, the res being the marriage status. Courts which adhere to the latter doctrine apply to suits for divorce the same rule which obtains in cases where jurisdiction over property confers upon the court power to render a valid judgment against a defendant to the extent of the property within its jurisdiction.

In view of the decision of the United States Supreme Court in the *Haddock* case, a person may find himself legally divorced in one state while in another state he will be held to be a married man. If he marry again, he may find himself lawfully married in one state, while in another state he would be held to be a bigamist. His children of the second marriage may be legitimate in Connecticut and illegitimate in New York and some other states. He may find himself in the situation of the man traveling on a Pullman car with a lady, who, when asked by the conductor if the lady was his wife, answered, "I don't know, that depends upon what state we are passing through." It has been held in New York that—

"The marriage relation is not a res within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

Jones v. Jones,⁵ and the courts of New York have repeatedly refused to recognize such a decree to be binding in that state. The same rule seems to prevail in Massachusetts, Pennsylvania, and in some other states. The courts of Alabama, Ohio, and perhaps some other states have taken the rather anomalous position that while a divorce granted on substituted service in another state dis-

4. 215 Ill. 496.

5. 108 N. Y. 415.

solves the marriage, it does not deprive the resident wife of her property rights. Such was the holding of the court in *Cox v. Cox*,⁶ and *Thompson v. State*.⁷ In the Thompson case it was said that if the foreign decree be held valid—

"it unmarries him (the husband) and sets him free from his marital vows to her (the wife). He is no longer her husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the state to protect its own citizens within its own borders. . . . No obligation of comity is paramount to this duty."

The opinion in this case contains much more of interest along the same line of argument in support of the contention that it is the first duty of the state to protect its own citizens in their property rights in such cases. Substantially the same doctrine is laid down in the case of *Cook v. Cook*,⁸ and *Doerr v. Forsythe*.⁹

From what has been said it is apparent that the consequences of the decision of the Supreme Court of the United States in *Haddock v. Haddock* have been and are far-reaching and dangerous to the well-being of society; as stated by Mr. Justice Brown in his dissenting opinion concurred in by Justices Holmes, Harlan, and Brewer, the court in that case seems to have taken

"a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede."

The opinion of the majority of the court in the *Haddock* case has completely nullified the full faith and credit clause as applied to suits for divorce in which constructive service only is obtained, and leaves it to the courts of each state to determine whether credit shall be given to the foreign decree, thus jeopardizing the social status and domestic relations of vast numbers of innocent people. Such, however, is now the settled law of the land. The doctrine in the *Haddock* case has been approved in the case of *Thompson v. Thompson*.¹⁰ A resident of Illinois may be guilty of the grossest violation of his marriage obligations in that state and then flee into another state and take up a residence there. Should necessity compel the wife to leave the state of Illinois and acquire a residence

6. 19 Ohio State 502.

7. 28 Ala. 12.

8. 56 Wis. 195.

9. 50 Ohio State 746.

10. 226 U. S. 551.

elsewhere, she would thereby surrender all right to claim the matrimonial domicile as her residence. If she should then, in her new home, sue for divorce and cause notice to be given by publication, as required by statute, and supporting her complaint by overwhelming evidence, obtain a decree, and thereafter remove into another state (perhaps the very state in which her renegade husband has taken up his residence), and in reliance upon the decree so obtained marry again and bear children, she may awake to find that in the state of her new home she is little better than an outcast; her children illegitimate and herself guilty of the crime of bigamy in the state of her latest domicile, all through no fault on her part; for in the supposed case she has pursued the only course open to her; she could not have followed her husband into another state for the purpose of bringing suit there, for she could not retain her residence in one state and at the same time be a bona fide resident of another state. The only way she could have obtained a decree binding in every state would have been to remain in the state of the matrimonial domicile, which in the supposed case would be Illinois, sue for divorce in that state where she could obtain a decree by constructive service of process on the husband, which under the rule laid down in the *Haddock* case would be entitled to full faith and credit in every state, under the Constitution of the United States. By remaining in the state of the matrimonial domicile she might find herself and her children destitute because of her inability to earn a living, while abundance awaited her elsewhere, of which she could not avail herself without the abandonment of the matrimonial domicile, which would render it impossible for her to obtain a decree binding in every state.

Every lawyer should read the opinion of Justice White (now chief justice) in the *Haddock* case, and also the dissenting opinions of Justices Brown and Holmes, in order to fully realize the extent of the "disaster to innocent persons," which that decision has caused and continues to cause. This decision was rendered so long ago¹¹ that many have forgotten it, and it is the duty of the members of the profession to call attention to the evil results which may follow a disregard of the principles there laid down. Justice Holmes, in his dissenting opinion, said—

"I am unable to reconcile with the requirements of the Constitution, Article 4, s. 1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those states."

11. April, 1906.

That the position taken by the four dissenting judges in the Haddock case should be the rule seems to the writer beyond question, and that this view seems to be supported by many of the previous decisions of the federal Supreme Court cited in the dissenting opinions, it is believed is equally true. The reasoning of Justice White in the majority opinion is far from convincing, while that of the dissenting justices seems to be logical and supported by abundant authority. The opinion of Judge Cartwright in the case of *Forrest v. Fey* was rendered in October, 1905, and is in harmony with these dissenting opinions, and is the law in Illinois.

How full faith and credit can be given to the judgments of the courts of a sister state if the courts of every other state have the inherent right to inquire into matters which do not, according to the laws of the forum affect the jurisdiction, and determine for themselves whether the trial court was justified in entering the decree, where it appears by the record that jurisdiction of the defendant was obtained according to the laws of the state in which the decree was entered, it is impossible to understand, for as stated by Judge Cartwright in *Forrest v. Fey*, whether the allegations of the complaint—

“or the proofs to sustain them are true or false, does not affect the validity of the decree if the court had jurisdiction to enter it. Where a transcript of a decree entered by a court of another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except questions of jurisdiction, including fraud affecting the jurisdiction or the discretion of the court to exercise such jurisdiction; after a court has acquired jurisdiction its findings are conclusive in all collateral proceedings; . . . such decree has the same effect in every other state as in the state where it was rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened.”

This should be the uniform rule, and many of the states adhere to it by comity, while others cling to the fiction that a suit for divorce is a proceeding in personam, and that without the presence of the defendant within the state of the forum (unless such state happens to be the state of the matrimonial domicile), the proceedings have no binding force outside of the state where it was entered.

Of course, if the court entering the decree is without jurisdiction of either of the parties according to the laws of the forum, its decree is void and can have no effect either in that state or elsewhere, and such want of jurisdiction may always be shown, for it is essential to the validity of the decree that the requirements of the law of the forum affecting the jurisdiction of that court and its

discretion to proceed to a determination of the cause shall be fully complied with, and when such a decree is offered in evidence it is competent to show in opposition:

(a) That the court was without jurisdiction of the complainant, because he or she was not a bona fide resident of the state.

(b) That the court had no jurisdiction of the defendant because of the failure to comply with some provision of the law of the forum in relation to giving to the defendant notice of the pendency of the suit.

(c) The failure of complainant to advise the court of any facts which might affect the discretion of the court to proceed.

The court which entered the decree would have the right also to vacate the same for any of these reasons upon application duly made.

In the case of *Montmorency v. Montmorency*,¹² the Texas Court of Civil Appeals, speaking through Chief Justice Peticolas, in commenting on the majority opinion in the *Haddock* case, said that decision seemed to be based on—

“the fiction that the matrimonial domicile stays with and follows the innocent party whether husband or wife, and that no matter where the innocent party may be the matrimonial domicile is there, and the guilty party is always constructively present, and therefore the court of that state has constructively both parties before it.”

There does not seem to be anything in the *Haddock* case to justify such a conclusion; the court in that case said nothing from which it might be inferred that if the wife had left the State of New York and taken up a bona fide residence in some state other than Connecticut, and there obtained a decree of divorce by constructive service, such a decree would be entitled to full faith and credit in every other state. It could scarcely be held that the wife could take the matrimonial domicile with her; an innocent husband could doubtless do so, for should a wife desert her husband without reasonable cause the husband upon becoming a resident of another state would presumably take with him the matrimonial domicile under the rule that the domicile of the husband is the domicile of the wife. This presumption would seem to preclude the wife from acquiring a new matrimonial domicile. That the wife can acquire a separate domicile is true, but that such separate domicile, if outside of the state where both lived at the time of separation, could become the matrimonial domicile, can scarcely be the law, and seems to have no support in any adjudicated case other than the dictum in the Texas case.

12. 139 S. W. 1168.

Whether, under the rule announced in the *Haddock* case, a decree is entitled to "full faith and credit" depends always, it is believed, upon the matrimonial relation of the parties within the state of the forum. The presumption that the domicile of the husband is the domicile of the wife is subject also to be defeated by evidence showing that the wife had acquired a separate domicile, for if the wife was justified in her desertion, the presumption that the domicile of the husband is that of the wife also would be thereby overcome, as in the *Haddock* case, where the domicile of the wife continued to be the matrimonial domicile after the husband abandoned her and became domiciled in another state. Had the wife abandoned the husband, and had he thereafter acquired a domicile in Connecticut, the presumption that the matrimonial domicile was in the latter state would probably have prevailed, at least until defeated by evidence sufficient to convince the court that the wife had good cause for the abandonment of her husband; and this reveals a weakness of the decision in the *Haddock* case, for we are confronted with a situation where after a decree—valid in the state where it was rendered—is afterwards attacked in another state, "full faith and credit" is not "given in each state to the * * * records and judicial proceedings of every other state;" on the contrary when the decree is offered in evidence in such other state the person in whose favor it was granted is called upon to show not only that he or she had fully complied with the laws of the state where it was entered, but also that the charge set forth in his complaint was true.

It is not difficult to imagine a case in which it might be found that the witnesses by whose testimony the complainant could have supported the charge set forth in the complaint have died or could not be found, thus rendering it impossible to make the required proof. In the *Haddock* case the husband had been a resident of Connecticut for about thirteen years before he brought suit for divorce, and the decree in the New York case was entered thirty-one years after the separation of the parties, and eighteen years after the entry of the Connecticut decree. All these facts appear from the opinion of Justice White, so that it would be difficult to find a case presenting stronger equities in support of a foreign decree. Some courts have strongly defended the decision of the Supreme Court in the *Haddock* case. Vice-Chancellor Stevenson, in the case of *Lister v. Lister*,¹³ said—

13. 86 N. J. Eq. 30.

"It seems to me that confusion of thought and consequent error have arisen from the failure to recognize the fact that each state absolutely controls the status of its domiciled citizens with respect to marriage. There is nothing strange in the notion that a man may be a married man in one state and an unmarried man in another state. A woman in New Jersey may be recognized by all the governmental agents of that state as married to a man in Illinois, while the man in Illinois may be recognized by all the governmental agents of that state as not married to the woman in New Jersey, but as unmarried or as married to some other woman. Each state enforces its own view within its own territory with regard to the status of residents, who are permanently subject to its power. Where one of the two states undertakes to divorce the spouse resident within its borders, the state where the other spouse resides, under the principle of comity frames its own code determining the matrimonial status of its own resident."

That the learned vice-chancellor has correctly stated the rules which govern in such cases is beyond dispute, and in holding the Nevada decree involved in that case to be void for want of jurisdiction of the complainant, the correct conclusion was reached by the court. The record showed plainly that the husband went to Reno, Nevada, for the sole purpose of acquiring a residence there, with the express object of suing there for divorce. He had no other business in that state, and in claiming to be a resident there he was guilty of an imposition upon the Nevada court, or as stated by Justice Cartwright in *Forrest v. Fey*, he was guilty of "fraud affecting the jurisdiction."

It seems to the writer that all the confusion, and consequent hardships, growing out of decrees for divorce valid in the state of the forum but denied recognition in other states, is due to the failure of the courts of some states, and also the United States Supreme Court to vindicate the nationality of this republic. In the consideration of the decrees of the courts of sister states each state is treated as if it were a foreign nation whose laws have no binding effect in any other country except by comity; the inhabitants of other states are given the same and no better recognition than if they were foreigners. This should not be, for all are citizens of a common country, and the general welfare requires that the fiction enforced in the *Haddock* case should be entirely wiped out, so that a valid decree, valid in the state where entered, will be binding throughout the republic.

The rules governing the decrees of the courts of sister states as declared by Judge Cartwright in the case of *Forrest v. Fey*, afford all the protection which any defendant has a right to demand. These rules are just, adequate, and sound; they deny recognition to

decrees where fraud affecting the jurisdiction has been perpetrated, and render all decrees void where, as in the Nevada,¹⁴ South Dakota,¹⁵ and other cases,¹⁶ a party has falsely represented himself or herself to be a bona fide resident of the state of the forum, when in fact he or she has gone to such state for the sole purpose of obtaining a decree, and has imposed upon the court of such state, but these same rules hold the decree valid in the absence of fraud affecting the jurisdiction or the discretion of the court to proceed to a final determination of the cause. This is all that any complainant has a right to ask, for he who perpetrates a fraud upon the court as to a matter which vitally affects the jurisdiction, is entitled to no protection from a decree entered in the cause; he has no right, either legal or moral, to demand that any court protect him from the consequences of such fraudulent conduct; consequences for which he alone is responsible.

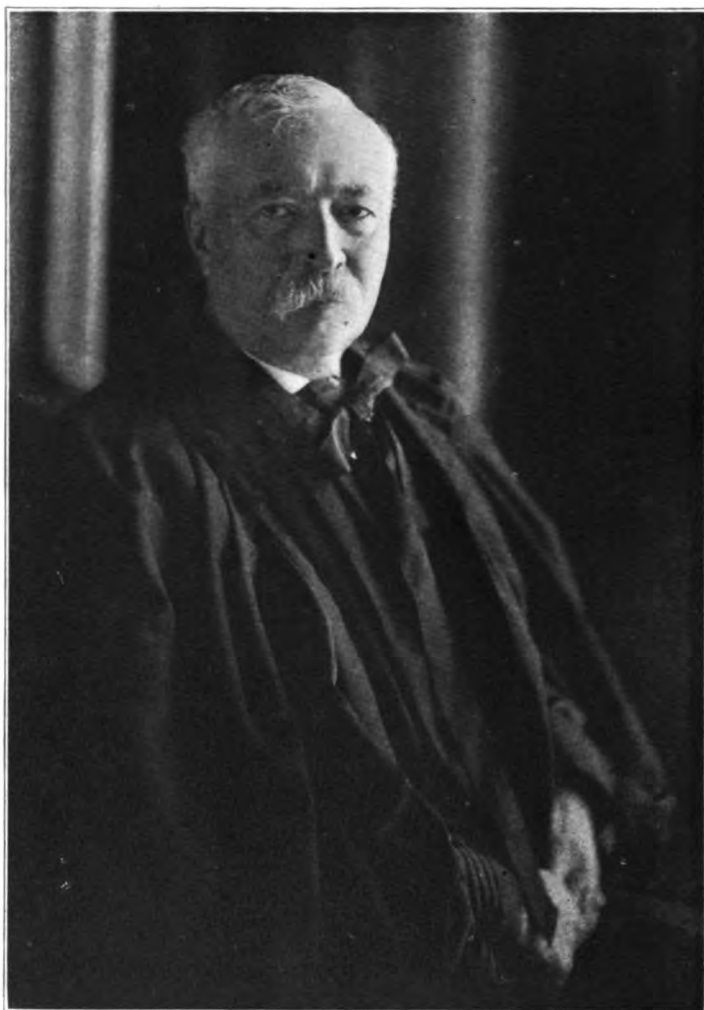
The marriage relation is the most sacred of any human institution, and yet some treat it as the least entitled to consideration; men and women become weary of their matrimonial bonds and resort to vicious practices in their attempts to obtain a dissolution of the marriage bond, little realizing that their fraudulent conduct will be unavailing! They go into states where the required jurisdictional period of residence is short, and falsely represent themselves to be residents of such state in good faith, when the sole object of their residence there is to give the court colorable jurisdiction to hear and determine their case; having at no time any intention of remaining in the state of the forum longer than is necessary to obtain a decree; failing utterly to realize that the decree when obtained will afford them no protection whatever when their fraudulent conduct shall be exposed to the light of judicial investigation.

It is difficult to understand why people will risk their own happiness, and happiness of children born of a subsequent marriage, by proceeding in a matter so vital to the welfare of the family and the state, without taking counsel as to the consequences which will follow their deliberate attempt to evade the wholesome requirements of the law.

14. *Lister v. Lister*, 86 N. J. Eq. 30.

15. *Andrews v. Andrews*, 188 U. S. 14.

16. *Bell v. Bell*, 175 U. S. 175.



[1920]

JAMES H. CARTWRIGHT
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EDITORIAL NOTE

JAMES H. CARTWRIGHT

On December 17th of the current year Mr. Justice James H. Cartwright will have completed twenty-five years of public service as a justice of the Illinois Supreme Court. Since Illinois entered upon her statehood in 1818, this remarkable record of extended service has seldom been equaled. Of those who have previously passed the quarter-century mark, one recalls the names of Justices Thomas C. Browne and William Wilson in the days of our first constitution; Justice Sidney Breese, who held office from 1841 until his death in 1878; and somewhat later, Justices Pinckney H.

Walker and Alfred M. Craig. A small but worthy company, this, into which Justice Cartwright now enters.

James H. Cartwright was born in Iowa Territory on December 1, 1842. The log cabin in which he was born was one of a cluster of three which stood in a clearing at the forks of the Maquoketa river and where now stands the thriving city of Maquoketa.

Mr. Cartwright was the eldest of three sons in a family of six children. His ancestry is purely English. The Cartwrights were among the early English settlers in this country, and though the exact date of their arrival is not known, we find them well established here at the time of the revolution. Barton Hall Cartwright, the father of James, married Jane Chloe Benedict, who was also descended from an old English family which had settled in New England.

Barton Hall Cartwright was, by profession, a Methodist preacher, and as such he came as a pioneer to the Iowa territory. When the family moved to Illinois, the next year after James' birth, the elder Cartwright "rode the circuit" for the Methodist church throughout the northern part of this state. Much has been told of the intense hardship which attached to the life of the circuit rider. It meant constant separation from his family for three or four weeks at a time, during which he traveled great distances through the then sparsely settled country, sometimes on horseback but often on foot, frequently finding it necessary to wade streams, and sleeping wherever a shelter of any nature might be afforded. And this, too, was the experience of Barton Hall Cartwright.

Meanwhile, James was passing a boyhood which was void of special incident other than that which ordinarily attached to the frontier life of the time. With his father and family he lived first in La Fayette Grove in Ogle County, and then successively in Prophetstown, Monmouth, Macomb and Centerville (which is now the town of Cuba). About the year 1850 the family moved to Buffalo Grove, in Ogle County, and during the two years he remained here. Barton Hall Cartwright built a home for his family at Mt. Morris. Here, for the first time, the log cabin gave way to the more modern board building, but the difficulty of construction was probably not less great, for there being no railroad from Chicago to Mt. Morris, the lumber was shipped to Cherry Valley and then hauled overland to Mt. Morris, a distance of some thirty or forty miles.

During these boyhood days, Mr. Cartwright gave little promise of developing into the rugged, healthy man that he is today. On the contrary, it is said that he was exceedingly frail and was constantly annoyed with a sharp, rasping cough which caused no end of anxious comment among the neighbors and no uncertain prophecies as to his future.

As he grew older, however, his physical weakness was gradually overcome, and in the meantime, when the family had moved to

Mt. Morris, he was able to obtain something of a grammar school education which, together with the more liberal training which he must have acquired through association with a person of his father's attainments, enabled him to enter the Rock River Seminary at that place.

He did not remain at the seminary to finish the prescribed course, and his attendance was at all times frequently interrupted to cut and haul wood or to work on the small farm which his father had in the meantime acquired. While he did remain at the seminary, however, he appears to have made considerable progress, for when the faculty were asked to recommend one of their students for a teaching position in a near-by country school, Mr. Cartwright was the first to be recommended. Because of a shortage of funds, he decided to accept the position thus offered, and we do not find that he again returned to the seminary.

When the Civil War broke out, Mr. Cartwright, then a lad of nineteen years, at once volunteered his services in behalf of the Union cause. His first regiment was the Sixty-ninth Illinois, in which he enlisted in April, 1862. This regiment was assigned to guard duty and Mr. Cartwright, during the summer of 1862, assisted in guarding Confederate prisoners at Camp Douglas. Later he took part in exchanging prisoners at Vicksburg, which was then in the hands of the Confederate forces. His enlistment expired at the end of three months. Meanwhile, his father had become a chaplain under General Sherman, and the younger Cartwright finding that his services were more urgently needed at home than in the army, did not re-enlist in the Sixty-ninth, but returned to Mt. Morris to assume the responsibility of caring for his mother and his younger brothers and sisters.

In June, 1864, he enlisted again. Previous to that time the governments of Illinois, Ohio, Indiana, and Iowa, believing that the war was nearing its close, had tendered to the President eighty-five thousand one hundred day men (so-called) to relieve the veteran soldiers from guard duty throughout various parts of the country. The One Hundred Fortieth Illinois Infantry, in which Cartwright then enlisted, was a part of this force. Cartwright, though but a young man of twenty-two, was elected captain of the company. His selection, however, though highly pleasing to the personnel of the company, seems to have met with disfavor among the superior officers, who would have preferred some older and more experienced man in his stead. Accordingly the matter was taken up with Governor Yates and in due time the young captain was summoned to Springfield and was asked to resign in favor of such a man of the desired qualifications as the company should select. Mr. Cartwright good-naturedly tendered his resignation. But when the matter of electing a successor was put up to the company the vote was unanimous in favor of his retention. Popularity was then allowed to prevail over the considerations of age and experience and Cartwright acted throughout the four months of service as the company's captain.

Upon the organization of the company, it was moved at once to Memphis, Tennessee, and from there it marched to Wolfe river, about thirty miles east of Memphis. It remained in this vicinity for the ensuing three months, having been assigned to guard a line of railroad between Wolfe river and Holly Springs. Later it was moved to Memphis, and did guard duty there until ordered to Camp Fry, Chicago, for muster out, which occurred October 29, 1864.

Returned again to civil life, Cartwright found that his savings during the brief period he had acted as captain were sufficient to make further attendance at school possible. Though he appears to have had no particular bent toward the law, he decided after some consideration, to take up its study, and in the fall of 1865 entered the law school of the University of Michigan. The course of study at that time was completed in two years, and in the spring of 1867 Mr. Cartwright had received his law degree, and, returning to his home in Illinois, was admitted to the bar in this state.

The early years of his practice were spent in the town of Oregon. Coming to this place from his home in Lighthouse, shortly after his admission to the bar, he secured an introduction to Henry A. Mix, who was then the leading lawyer in Oregon and who consented to help him in his desire to obtain a position in a law office in Chicago. Pending negotiations for such a position, Mr. Cartwright went to work for Mr. Mix, and when he failed to secure work in Chicago, remained in Mr. Mix's office until the latter was accidentally killed, some months later.

In 1868 he assisted in the condemnation of a right of way for a branch of the Chicago and Northwestern Railway between Oregon and Ashton. The road, however, failed to materialize at that time. Shortly thereafter, certain of the parties who had been interested in its construction conceived the idea of building the Chicago and Iowa railroad (now a part of the Chicago, Burlington and Quincy road) from Aurora to Forrester and west. Mr. Cartwright was selected as general attorney and solicitor for the new enterprise, and out of this employment came a vast amount of experience in condemnation work which today makes Justice Cartwright so particularly well qualified in the law of eminent domain.

The task of securing the right of way involved endless difficulty and a great amount of litigation. One source of difficulty was a provision in the new constitution of 1870, which had just then been adopted, prohibiting the taking of property except on the verdict of a jury. As no statute had yet been passed to comply with the constitutional provision, it was a question as to how that provision might be satisfied. Fortunately the question had come up in the state of Maryland, under substantially similar circumstances, and the Supreme Court of that state had held that the right of appeal from the award of commissioners satisfied the constitutional provision. That decision was Mr. Cartwright's only hope. Whenever it failed, he was obliged to dismiss his condemnation proceeding. The fact that he was successful in securing the right of way, how-

ever, tends to prove that he used this only weapon with telling effect.

With the road established, Mr. Cartwright was retained as general attorney until 1876, when the company went into the hands of a receiver. He was retained, even after that time however, in connection with the general business of the road. His office, during a part of this time, was located in Chicago, and his home here—a small frame house—stood on Dearborn street just north of the present site of the Great Northern Hotel.

Meanwhile, on November 26, 1873, Mr. Cartwright was married to Hattie L. Homes of Oregon. Six children have been born of this marriage—two sons and four daughters.

Mr. Cartwright resumed the practice of law in Oregon in 1876, and from that time until 1888 was a Master in Chancery of the Circuit Court of Ogle county. In 1888 he was elected to a circuit judgeship, succeeding Mr. Justice Eustace. He was re-elected in 1891 and assigned to appellate court duty in the second district at Ottawa. His decisions while on the appellate bench begin with the case of *Cook v. Tavener* (1891, 41 Ill. App. 642), and end with the case of *Parker v. Wilson* (66 Ill. App. 91). In 1895 he was elected to the Supreme bench to fill the vacancy caused by the death of Mr. Justice Bailey, and was re-elected in 1897, 1906 and 1915. His present term will expire in 1924. His Supreme Court decisions will be found beginning with the case of *Oeltzen v. People* in the 160th Supreme Court reports, at page 409.

An estimate of Justice Cartwright's work on the Supreme bench is made elsewhere in this REVIEW. There remains to be said here something of the vast amount of that work. Mr. Justice Carter is credited with the statement that Justice Cartwright, during the entire period of his Supreme Court judgeship, has written on an average seventy-five opinions each year. In substantiation of that statement, we have turned to the Supreme Court reports of this state for the period immediately following Justice Cartwright's first election—a period in which we should expect him to make his smallest contribution—and in 1896, the first year after his election, we find that he wrote sixty-six opinions; the following year he had increased this number to ninety-six; that he delivered seventy-nine opinions in 1898, fifty-seven in 1899, and seventy-seven in 1900. When we consider how short a time each year can be spent by the Supreme Court justices in writing opinions, Justice Cartwright's record seems almost unbelievable.

In order to perform such a vast amount of labor and to withstand the attendant physical strain one must of course possess a remarkable physique, together with extraordinary good health and powers of endurance. And Justice Cartwright is fortunate in possessing all three. The rugged life he was obliged to lead while a boy not only helped him to overcome the frailties of his youth but seems to have given him a constitution which no strain of later life has been able to impair. His health is remarkable. In the past twenty years he has not once been confined to his bed with sickness,

but on the other hand has been in constant attendance at the terms of the Supreme Court and in the twenty-five years of his service has not been absent more than three or four days all told.

Justice Cartwright himself will say that his health is the resultant of three things—simple living, regular habits and a proper amount of relaxation. No one can really become acquainted with Mr. Cartwright without being impressed by his great love of the commonplace in all matters. His regular habits are vouched for by those who know him best.

We are told that he always has a fixed time for everything and that everything is done precisely at the appointed time. Whether a business engagement, a social affair, or what not, Justice Cartwright acts with the same precision and promptness in every detail. As for his relaxation, Justice Cartwright has adopted an interesting plan. Just outside of the town of Oregon he owns a large farm, a part of which is covered with heavy timber. In this timber area he has built a small, restful cottage, and to this place he repairs when the strain of his work becomes too heavy. A few days spent in the quietness of these surroundings revives in Mr. Cartwright his original vigor and enables him to return to his work and attack it with his customary energy.

Another quality which must be possessed in order to turn out such a vast amount of work is of course the ability to work with extreme rapidity. And Justice Cartwright possesses this ability to a marked degree. An illustration may here be of interest. As has been said, Justice Bailey died in October, 1895, and Justice Cartwright was elected to succeed him in the following December. It is the practice in the Supreme Court for a succeeding justice to take up the unfinished work of his predecessor. Justice Cartwright, upon his election, found thirty cases which had been assigned to Justice Bailey, awaiting his decision. He undertook this task during the recess between December and February terms of court, and in the thirty days that intervened he not only wrote opinions for these thirty cases but also for all cases that had been assigned to him at the December term; so that when the February term commenced he was able to report a total absence of unfinished work.

And with this same amazing rapidity, Mr. Cartwright has been handing down decisions all through the twenty-five years of his Supreme Court experience. In this connection it is interesting to note that Justice Cartwright's opinions on cases argued at the October term of court—which is by far the busiest of any of the terms—are almost always completed in the two short recesses that intervene before the opening of the February term, a feat which can scarcely be appreciated except by those who have attempted to duplicate it.

It might be thought that because of the great rapidity with which Justice Cartwright works that his opinions would lack the close consideration which would result from a greater deliberation. Such, however, seems not to be the case. Justice Cartwright's mind is distinctively and emphatically judicial. His thinking is clear-cut,

analytical, direct. He has the faculty of going at once straight to the heart of a case. Consequently he is able to arrive at a decision in a minimum of time, and the opinion, moreover, is logical and concise.

Stopping merely to catalogue certain other of Justice Cartwright's characteristics—his extreme positiveness on all questions and especially public questions, his brusque manner particularly on the bench, which is nothing more than a mask for the genial nature that lies behind it—we come to an interesting sidelight on the man in his choice of an avocation, namely the breeding and training of fast trotting horses. Barring his interest in his chosen profession, no other interest so absorbs his time and attention. So extensive has been his study of the theoretical perfection of the trotting horse that he can be classed as an authority on the subject. His theories have been carefully put into practice on the large farm which he maintains near Oregon, with the result that from his stables have come some of the fastest horses known to the Grand Circuit. One in particular should be mentioned—Citation—who for one year was undefeated champion of the Grand Circuit.

Justice Cartwright's other hobby is the study of Illinois political history. Here again he is accorded the rank of an authority. It is said, indeed, that few men in the state, not even barring those to whom politics is a profession, can claim such an intimate knowledge of the history and workings of our political institutions. Mr. Cartwright has not, however, been actively engaged in politics. He made one campaign for mayor of the town of Oregon. But since that time he has never been a candidate for any public office, except that of judge, and in the latter he has been consistently successful. His political affiliations are with the Republican party.

The circumstances under which this sketch of Justice Cartwright is written have made it necessary, of course, to secure data from others than Mr. Cartwright himself, and much that is here written, therefore, must be imperfect. But if its very imperfection shall encourage Justice Cartwright to overcome the natural modesty which he has heretofore exhibited concerning the events of his life, it will have served no unworthy purpose.

Meanwhile, Mr. Cartwright's many friends, on the bench and among the members of the bar, will welcome this opportunity to congratulate him on the completion of his extended term of eminent service, and to wish for him the continued good health and sturdy physique which he enjoys today, in order that he may extend his monumental labors through many years yet to come.

CLYDE F. DEWITT.

COMMENT ON RECENT CASES

EMINENT DOMAIN — NECESSITY FOR ACQUIRING PROPERTY SOUGHT TO BE CONDEMNED.—A public service corporation, or even a public body, seeks to acquire a piece of property for use in connection with its corporate or public purposes. How far can the necessity of that property for the particular purpose be inquired into? In the case of *C. M. & St. P. R. Co. v. Franzen*, 287 Ill. 346, 122 N. E. 492, the question arose in connection with a plan which the railroad had conceived of making a short cut for certain traffic over its lines, and there the court says that if the purpose is within the public-serving capacity of the corporation, the decision of the corporation upon this question of necessity will be conclusive in the absence of a clear abuse of the right (287 Ill. 356).

This statement of the rule calls to mind the earlier case of *City of Chicago v. Lehmann*, 262 Ill. 468, where the city condemned certain property for public school grounds to be used in connection with other property previously acquired, on which a schoolhouse had been erected. The allegation of the petition was that this property was necessary to be acquired and this allegation was denied by the defendant upon that question of necessity. The court there says that while the question whether the sovereign power of eminent domain shall be conferred upon corporations or municipalities is legislative and not subject to interference by the courts, "the question whether the particular property sought to be appropriated is necessary for the public use *is* for the courts" (the italics are supplied) and this question arises where the defendant takes issue on the allegation of necessity in the petition and the necessity must then be proved by the petitioner, but it is a question for the court. The court goes on to say, however, that the discretion of the corporation will not be interfered with where it is not abused, but that the discretion *is* subject to review by the courts.

This ruling of the *Lehmann* case was approved in the recent case of *Village of Depue v. Banschback*, 273 Ill. 579, where the court says that while the propriety and necessity of a public park within a village is one for the governing officers of the village and not for the courts, and while the necessity of exercising the power of eminent domain is also one for the governing officers of the municipality, nevertheless the question whether, the body having elected to exercise its power, a particular piece or all or part of certain property was necessary or proper to be taken or not, was one to be inquired into by the court (273 Ill. 579). Again in *P. C. C. & St. L. R. Co. v. Goge*, 280 Ill., 639-645, the court approves the position of the *Lehmann* case with these words: "When the averment of necessity in a condemnation petition is denied the burden is on the petitioner to establish the fact."

It appears that the pioneer case in Illinois upon the question is that of *C., R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333. There

the railroad filed a bill to enjoin the Town of Lake from opening a street through its property. The case was decided upon the point that the Town of Lake was attempting to condemn property already used for a public purpose (railroad) and divert it to another public purpose, which could not be done. But in arriving at its conclusion, the court uses this language, upon the authority of Dillon ("Municipal Corporations," Sec. 465):

"Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislative or of the corporate body or tribunal . . . is conclusive upon the courts . . . ; but the question whether the specified use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is perhaps ultimately a judicial question . . . But if the use is public, or if it be so doubtful that the courts cannot pronounce it to be such as not to justify the compulsory taking, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive."

It must be apparent from this language that the court considers the terms "public purpose" and "necessity" in *pari materia*. If the particular property is necessary for the purpose, then its taking is for a public purpose, otherwise not. That would seem to reconcile the various cases on their facts. Thus note *P. F. T. W. & C. R. Co. v. San. Dist.*, 218 Ill. 286-290; *T. H. & P. R. Co. v. Robbins*, 247 Ill. 376, 381; *City of Paris v. C. V. & C. R. Co.*, 248 Ill. 213-218; *C. & W. I. R. Co. v. City of Chicago*, 255 Ill. 136, 138.

E. M. L.

BANK FRAUD—DIRECTORS' LIABILITY—BATES v. DRESSER, 251 U. S. 524 (40 Sup. Ct. Rep. 247).—This is a case interesting to prospective bank thieves and to all official bank examiners and to bank directors. It was a bill in equity brought by the receiver of a national bank to charge its president and directors with loss of assets through thefts of an employe.

A young and resourceful man named Coleman, employed as bookkeeper in a small bank, succeeded in taking from the bank the sum of \$310,143.02 in various amounts over a period of about five years. He thus added considerably to his otherwise meager salary of \$12 a week, and played the game so well that until the bank failed neither the government bank examiners nor the directors or officers of the bank were aware that any funds had been lost. His record may perhaps be regarded as bogie—at least for banks with only \$300,000 of average deposits. And yet the directors were held not liable for negligence, on account of the cleverness of his game.

† Coleman had a small checking account at the bank. He worked the fraud by drawing a check from time to time on this account, then exchanging it for the check of a Boston broker which he would cash; and when his own check came through he would abstract it from the envelope, enter the others on his book and conceal the difference by a charge to some other account or by a false addition. He handed to the cashier only a slip from the clearing house that

showed the totals; and the cashier paid to the clearing house what thus appeared to be due. In this way Coleman's checks were always honored.

The cashier was honest himself and had no suspicion of Coleman. Only diligent search or a lucky chance would have revealed the fraud. And for this reason the court excused the directors. Their negligence consisted in accepting the cashier's statement of liabilities and failing to inspect the depositors' ledger. The statements of assets were always correct. And Mr. Justice Holmes said that a false statement of liabilities was not the direction in which fraud would naturally have been looked for—at least not in Cambridge, Mass., before 1910.

But the position of the president was held to be different. He was daily at the bank for hours and had had hints of Coleman's dishonesty. He knew of the apparent rapid decline in deposits. Therefore a judgment of the lower court holding his estate liable was affirmed and interest added.

The case is entirely consistent with the leading case of *Briggs v. Spalding*, 141 U. S. 132; *Bowerman v. Hamner*, 250 U. S. 504, and with *Holmes v. McDonald*, 226 Ill. 169, and *Wallach v. Billings*, 277 Ill. 218. In the latter case the court said: "The duties of a bank director vary according to the business circumstances and situation of every individual bank, so that it would be impossible to specify any particular thing that he should do."

But if the rule of law is thus vague it has become somewhat more definite by its application in the several cases that have arisen. And if it was possible to plead ignorance of the novel kind of fraud which Coleman practiced in the principal case in Cambridge, Mass., in the year 1910, no director familiar with that case or who unfortunately happens to read this note can hereafter spend his Saturdays and Sundays to better advantage than in checking not only his bank's assets but also in being sure that the bank has no greater liabilities than he thinks it has.

W. B. H.

DEEDS—DELIVERY OF.—Our first thought on the frequent occurrences of cases in the Supreme Court upon the subject of delivery of deeds is one of surprise. There are from three to five cases on this relatively simple subject in almost every one of the recent volumes of the Supreme Court reports. There are, of course, no difficult questions of law involved.

The explanation of the frequency of adjudication on this subject is to be found in the variation of circumstances of fact out of which these cases arise. The difficulty is in the application of these simple fundamental principles to the widely varying states of fact. The case of *Nofftz v. Nofftz*, 290 Ill. 36, 124 N. E. 838, and *Jones v. Schmidt*, 290 Ill. 97, 124 N. E. 835, arising as they do out of different sets of facts, and resulting in opposite conclusions, illustrate the truth of the above remarks in high relief.

In *Nofftz v. Nofftz*, *supra*, the deed, as to which it was claimed there was a delivery, was from father to daughter. The evidence

was said by the court to be unsatisfactory. It was contended by the alleged grantee that she had had the deed in her possession at one time for about two hours. The evidence was further, however, that the deed was thereafter in the possession of the grantor in his safe deposit box. Out of these two circumstances, i. e., the fact of relationship and the possession by the grantee of the deed, it was said that two presumptions favorable to the claim of delivery arose. It is true, of course, that circumstances indicating a voluntary settlement give rise to a presumption of delivery. It is also true, of course, that possession by the grantee gives rise to the same presumption. But both of these presumptions are rebuttable and the Supreme Court finds in the facts of the *Nofftz* case that they are rebutted by other facts inconsistent with the *presumed* intention of the grantor to part with control of the deed.

To deal first with the question of presumed delivery from the grantee's possession—such possession to sustain the presumption cannot be of the nature of permissive custody but must rather evidence permanent control. Evidence that the grantee had had the deed in her possession for a time only would not be sufficient to sustain the presumption. This was held in the case of *Hollenbeck v. Hollenbeck*, 185 Ill. 101. In this case the possession was temporary and was yielded back to the grantor apparently without question by the grantee after a mere cursory inspection by the grantee. In addition to this no demand for the return of the deed was made by the grantee for a very long space of time. The conclusion from these facts in the Supreme Court is certainly quite satisfactory.

Upon the score of the other presumption, the facts marshaled against the claim of delivery were the payment of taxes by the grantor himself since the date of the deed, that he had at all times remained in possession of the premises, had improved them with new buildings and expended large sums of money in the repair of old, had tilled the land and paid drainage assessments against it, and had appropriated, without account to the grantee, all income from the property. It appeared further that this deed, if it was to have any effect at all, was not to take effect until after the death of the grantor. From these facts the court found, and here again the conclusion from the facts is certainly satisfactory, that this was an attempted will by deed.

The presumptions of law settled in this case have been established for a long time in the Supreme Court. That the presumption of delivery from the possession of the deed by the grantee may be rebutted by proof of the fact that the deed was an attempted will was established in the case of *Oswald v. Caldwell*, 225 Ill. 224. That the presumption of voluntary settlement is rebutted by acts of ownership as by the payment of taxes or improvement of the land as established in the case of *Shults v. Shults*, 159 Ill. 654, and *Shovers v. Warrick*, 152 Ill. 355. That the presumption of voluntary settlement may be rebutted by proof that the deed was to operate as a will, has been established by numerous cases of which the following are a few: *Weigand v. Rutshcke*, 253 Ill. 260; *Hawes v. Hawes*,

177 Ill. 409; *Wilenou v. Handlon*, 207 Ill. 104 1. *Cline v. Jones*, 111 Ill. 563; *Fouts v. Bell*, 172 Ill. 345.

The case of *Jones v. Schmidt*, *supra*, is one in which the presumption of delivery in the case of voluntary settlement was sustained. The grantee was the infant son of the grantor. The deed had been placed with the bank in an envelope, upon which the attorney for the grantor had placed the memorandum, "The within deed to be delivered to W. D. Schmidt for the purpose of recording at my decease in case the same shall not be recalled by me during my lifetime." It appeared that this memorandum was placed on the envelope without the knowledge of the grantor. The banker testified that had the grantor called for the deed he would have returned it to him.

It was said in aid of the claim of delivery that the presumption obtained. It was urged, however, that this presumption was rebutted by proof that the deed was to operate as a will and point was made of the legend upon the envelope and the statement of the banker that he would have returned the deed upon request. The first point the court dismissed upon the showing that it was not the instruction to the attorney of the grantor that such a legend should be put upon the envelope and that therefore the act of the agent in leaving the deed with the banker in that manner was unauthorized. As to the statement of the banker as to what he would have done, that was of no moment in the controversy. What a stranger would have done under the circumstances was not of any use in determining the intention of the grantor. This has been established in other cases. The conclusion of the court in the instant case was fortified by evidence from the will of the grantor that he did not consider himself to be the owner of any real estate whatever and that he had repeatedly stated in his last years that he had given the land to his grandson. The evidence concerning the exercise of ownership and payment of taxes the court did not deem of great weight apparently in the light of the foregoing. We suppose that this was for the reason that the grantee was an infant and much more was to be presumed in aid of delivery in such a case than otherwise. It would be natural that a grantor should do as he did: manage the land and pay the taxes for the benefit of his incompetent grantee. It cannot be stated that this is unfair or unsupported by the cases.

In these two cases then we have the presumption sustained in the one and rebutted in the other. No new principles of law were announced. Those well established were applied in different manner to different sets of facts.

A. S. L.

DRAINAGE—OBSTRUCTION OF SURFACE WATER—NUISANCE—EQUITY JURISDICTION.—The case of *Winhold v. Finch*, 286 Ill. 614, 122 N. E. 53, recalls the comment in ILLINOIS LAW REVIEW, IX, 278. That comment discusses the application by the courts of Illinois of the terms nuisance to invasions of private rights in real estate, even though such invasions do not consist in acts noxious

to one or more of the senses. Thus, the common understanding of the term 'nuisance' calls to mind such acts as cause odors unpleasant to the sense of smell, or sounds unpleasant to the sense of hearing, sights unpleasant to the eye, pollution of water rendering it unpleasant to the taste, or even a condition of vibration communicated to the land of the neighbor that is unpleasant to the sense of feeling. However, as in the comment above referred to, the term is not limited to such acts in its scope. Indeed, any act by one owner, upon his land, that interferes with the physical enjoyment by the neighbor, of his land, is a nuisance. "Sic utere tuo ut alienum non lædas."

Ordinarily, the class of acts which one owner might commit upon his land that would operate to interfere with the physical enjoyment by the neighbor of his land, would be such as are noxious to one or more of the five senses above enumerated. But, as also indicated in the comment, acts that do thus affect one or more of these senses do not in fact comprise all acts which one may commit upon his land to the injury of the neighbor's physical enjoyment of his land. A servient owner is bound to receive surface water from the neighbor's land, where it comes in the natural course of drainage, and an obstruction that excludes such water is an interference with the other's physical enjoyment of his property. Within that definition, it would be a nuisance. That is the view taken by the case of *Windhold v. Finch*, above.

But the most valuable point in that case is that upon the question of equity interposition in such cases. Again reference is made to the comment above already referred to. As stated in that comment, the question in such cases always is whether equity will take jurisdiction in the first instance, or whether it is not necessary first to go into a court of law to determine if the act complained of is really legally a nuisance; and, as there stated, the test is whether the injury caused thereby would be irreparable, and upon the question of irreparable injury, it was stated that the only element the cases seemed to afford as indicative of irreparableness, was that of permanence of the nuisance.

That construction of the effect of the authorities seems to be confirmed by the said case of *Winhold v. Finch*. Thus note the language of the court (286 Ill. 619):

"The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation, but one of such character that the law cannot give adequate compensation for it. The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages, only, often furnishes the very best reason why a court of equity should interfere in a case where a nuisance is a continuous one. . . . Where an injury is of such constant and frequent occurrence that no fair or reasonable redress can be had for it in a court of law, it may be enjoined."

The sense of this must be considered as in appreciation of the fact that damages for a continuing or permanent nuisance of the

character in the principal case would be depriving the complaining party of a real property right; and because no two pieces of real estate are the same, and, therefore, money cannot buy a piece of real estate exactly to replace that taken, damages are always inadequate in such cases.

E. M. L.

VALUATION ACT OF MARCH 1, 1913—CONDEMNATION VALUE AND ORIGINAL COST APPRAISAL.—The decision of March 8 in the case of the *United States ex. rel. Kansas City So. R. Co. v. Interstate Commerce Comm.*, U. S. 40 Sup. Ct. 189, 64 L. ed. 367, is unfortunate in the disrupting effect it is likely to have upon the already confused field of public utility valuation—not on account of what the decision actually holds, but because of the misconception which it will foster and already has fostered.¹

The case arose out of a proceeding under the Valuation Act of March 1, 1913, to determine the general value of the railway property. It was not a rate case. The present suit was brought to mandamus the Commission to hear proof and make a finding, as to the "present cost of condemnation and damages or of purchase in excess of such original cost or present value" as specifically required by the Valuation Act. The defense pleaded was non-compliance with the statute "because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to carrier's lands." The court found that Congress had power to impose the requirement of such a finding upon the Commission and that compliance with the requirement was not impossible.

The merits of "condemnation" value were not in issue, and were not passed upon. The court did not deny, directly or by implication, the "sophistry" of the strained reproduction cost appraisal with its "mental obliteration of the railroad" and "impossible hypotheses." No requirement was made that such value be included in the rate-base or final valuation for taxing purposes. The holding of the *Second Minnesota Rate* case (*Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511) as to the evidentiary weight of such a finding in a rate case remains unaltered. Nothing was decided as to the place of "condemnation" value in the final or ultimate valuation of the property for any specific purpose. It must be estimated and reported by the Commission. The decision goes no further. If valuation work is to be saved from added chaos this point cannot be overemphasized by any comment upon the decision.

The case resulted from a confusion between the practicability and economic soundness of the statute and its legal effect. It is one phase of the nation-wide attempt of bodies confronted with actual rather than theoretical regulatory problems to get away from speculative reproduction-cost valuations. Condemnation value, when the railroads were actually required to pay it, would be reflected in the original cost appraisal. Present condemnation value is a proper ele-

1. Article entitled "Must Include All Elements of Cost in Railroad Land Value," in Vol. I, No. 7, *American Railroads*, March 16, 1920.

ment in the reproduction cost appraisal, but, because it is speculative and may represent no actual investment, it is one of the elements of that appraisal which have discredited it and, in effect, relegated it to the sphere of a mere check upon the original cost appraisal. The conjectural character and minimized ultimate value of such an appraisal considered with the excessive cost of making it and the protection given the roads in the original cost allowance of condemnation expenses furnish ample justification for omitting the appraisal from the requirements of the statute, but not for disregarding it while it remains within the direct requirements of the law. The remedy is legislative, not judicial action. The Supreme Court was without power to correct the legislative error it must have joined in deploring.

HARLEIGH H. HARTMAN.

FRANCHISE TO USE STREET—LICENSE BY MUNICIPALITY.—The case of *City of Sullivan v. Central Ill. Co.*, 287 Ill. 19, 122 N. E. 58, re-echoes the anomalous rule apparently established in this state, that the right which a public service corporation acquires in the streets of a city is not a franchise, but an irrevocable license. (ILL. LAW REV., XI, 212.) In that case the question arose when the public service corporation brought directly to the Supreme Court from the nisi prius court, a proceeding by the City of Sullivan to compel the public service corporation to remove its poles, wires, etc., from the streets of the city. A license from the city to the appellant's predecessor had expired and had not been renewed, but the appellant's position was that the city had estopped itself to deny appellant's right to use the street.

The Supreme Court transferred the case to the Appellate Court on the ground that no freehold or franchise was involved, and in support of the position that no franchise was involved, the rule above referred to is relied upon.

It is submitted the criticism stated in the LAW REVIEW comment cited above is equally pertinent here.

E. M. L.

COMMON LAW MARRIAGE.—It is interesting to note that the prophecy made in ILL. LAW REV., IX, 214, to the effect that common law marriages, though abolished by statute in this state in 1905, would still appear in the annals of our state judicial decisions, from time to time, has again been justified (*Sebree v. Sebree*, 293 Ill. 237, 127 N. E. 392), the other most recent occasion of its verification having received comment in ILL. LAW REV., XV, 50; in each case, however, the court, while recognizing the validity of such marriage in the particular case, had it been proved, held the proof fell short of its establishment.

E. M. L.

DIVERSITIES DE LA LEY

MAY A JUDGE REFER TO HIS ASSOCIATES' OPPOSING OPINION AS "THE MOST BEAUTIFUL BOUQUET OF BOURBON BLUNDERS"?—In Judge Carter's gem of a book on "The Ethics of the Legal Profession" (p. 77), he quotes a veteran's apothegm that "judges should be gentlemen; yet if they know a little law, so much the better"; and adds, "One of the requisites, surely, of a judge is that he should be courteous." Further on, he quotes also, however, Rufus Choate's ideal description of a judge "courageous enough to give the devil his due." I find no comment on the problem how the judge shall reconcile these two fundamentals when the devil to which he wishes to give its due is a majority opinion of his own colleagues from which he is expressing his unsuccessful dissent. Presumably, in such a conflict of impulses, it has hitherto never been doubted that the duty of courtesy should override the duty of plain-speaking.

However, here we are in the twentieth century with an instance of the latter principle overriding the former. Five or six centuries ago explosive temperaments on the bench, in the days when every knight still wore armor and every gentleman paraded with his sword, did indeed burst forth, orally, in the very court, under excitement of absurd legal assertions made to their faces by associates. Mr. Zane¹ and Mr. Holdsworth² have culled some of these from the Year Books. But we thought that day had passed away, never to return in the processes of evolution.

However (presumably as a small but natural part of the universal collapse of nervous self-control), we do find today a member of a State Supreme Court, in the cool deliberation of a written opinion vituperating his colleagues' majority opinion as a "most beautiful bouquet of Bourbon blunders," and even proceeding (shades of Mansfield and Marshall!) to cumulate the vituperation in detail.

Here are the relevant passages; the Bar Committee on Professional Ethics can determine what section of the Code is involved:

Cleveland v. Public Utilities Commission, Supreme Court of Ohio, July 8, 1919, published Feb. 24, 1920, in 125 N. E. Rep. 864, 868. Per Curiam opinion with six judges concurring. WANAMAKER, J. (concurring in reversal, but not in remanding):

"The one and only vital question in this case, as I conceive it, is one affecting the jurisdiction of the Public Utilities Commission to make any order fixing the rates that the Cleveland Electric Illuminating Company may charge the city of Cleveland and its inhabitants for light, heat, and power. . . .

1. "The Five Ages of the Bench and Bar of England" (Select Essays in Anglo-American Legal History, I, 653).

2. "History of English Law," vol. III.

"If the *Telephone case*, 98 Ohio St. 358, 121 N. E. 701, *Cleveland Telephone Company v. City of Cleveland*, was rightly decided, then the commission had the necessary jurisdiction. If the *Froelich case*, decided nearly a year later, *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N. E. 212, was rightly decided, then the commission was without jurisdiction. The opinion is sensitively silent as to these two cases; but having remanded the case to the commission for further determination, the presumption is that this court means to follow the *Telephone case* rather than the later *Froelich case*, without undertaking to distinguish them, or to affirm the one and repudiate the other.

"It may have been the wiser course. It is so much easier to assume that power in the commission than to argue it; it is so much easier to declare it than to demonstrate it. The doctrine I declared in my dissenting opinion in the *Telephone case* is pertinent here on the question of jurisdiction. Therein I denied the right of the commission to make a contract for the city of Cleveland and its inhabitants upon the one hand and the telephone company on the other.

"Home rule was betrayed in the *Telephone case*. It is now being buried in this. . . .

"After this decision in this case, riveting General Assembly rule and commission rule, the worst form of modern autocracy, wholly irresponsible to the people affected by its action, the hour is at hand for fair and fearless speech, to advise, if to no other purpose, the people of the cities and villages of Ohio as to what has happened to their boasted home rule. . . .

"Upon what principle of judicial construction is it now held that when the people wrote into their Constitution, 'Municipalities shall have authority to exercise all powers of local self-government,' this did not include the police power, the most important, the most vital, the most comprehensive of all governmental powers? Evidently the court in its majority opinion in the *Telephone case* felt obliged to make some showing as to why such police power was lodged in the General Assembly over and above the police powers lodged in the municipality, and accordingly made the following declaration of principles, as appears on page 362 of 98 Ohio St., on page 702 of 121 N. E., of the opinion in the *Telephone case*:

"Police power, however, cannot be divided along these lines or any other lines. There is no such thing as municipal police power as distinguished from state police power. Such a proposition is too absurd to require argument to the contrary. Counsel make no such claim. Every court in Christendom since the establishment of civilized jurisprudence, without a single dissenting voice, has held that police power is a power that inheres only in the sovereign."

"This is strong, sweeping language. It goes to the very foundations of the judgment in this case. It is indeed the major premise upon which the conclusion in the case is founded.

"It is an old truism that a conclusion is just as sound and no more so than the premises upon which it is based. I make bold to say that there is contained in this language the *most beautiful bouquet of Bourbon blunders, expressed and implied, that has ever been handed to the bench and bar of Ohio*.

"It never was true of America since the Declaration of Independence, and it has not been true in Europe save under the autocracy of Louis XIV.

"*Blunder No. 1:* The court in its opinion failed to comprehend, or at least consider, the far-reaching scope of police power, as defined by the Supreme Court of the United States in the case above cited. *Sligh v. Kirkwood.*

"If it had recognized the comprehensive scope covered by this kind of power, it would not have fallen into the resulting blunders in that case, which culminated in *the greatest blunder of all*, the judgment.

"*Blunder No. 2:* 'Police power cannot be divided along these lines or any other lines.'

"The primary student in the American system of government knows that our whole theory of constitutional government is based on delegated powers, and when you delegate power you necessarily divide it. The fathers delegated a part of their sovereign power to the nation, they delegated a part of their sovereign power to the state, and they reserved to themselves a part of that sovereign power. If this does not divide governmental power, including, of course, police power, I do not understand the use of the word 'division.'

"*Blunder No. 3:* 'There is no such thing as municipal police power as distinguished from state police power.'

"Courts are constantly called upon, both state and federal, to distinguish between a federal police power and a state police power, and likewise between a state police power and a municipal police power. This is such a self-evident truth that the wonder is that such an absolutely fatal policy would be seriously announced in view of the present state of the law.

"*Blunder No. 4:* 'Such a proposition is too absurd to require argument to the contrary.'

"In view of what has been said, *I leave it for bench and bar of Ohio to locate the absurdity.*

"*Blunder No. 5:* 'Counsel make no such claim.'

"But counsel did make such claim and made it again and again, both in brief and argument; but, even if counsel did not make such claim, the Constitution itself makes the claim, the city of Cleveland makes the claim, and to say that there is no such thing as municipal police power in this modern day—well, it is hard to be patient or polite in the face of such a self-evident fallacy.

"*Blunder No. 6:* After these amazing propositions are stated, the court says:

"'Every court in Christendom since the establishment of civilized jurisprudence, without a single dissenting voice, has held that police power is a power that inheres only in the sovereign.'

"Now, nobody ever doubted this last proposition; but the question is: Who is sovereign? This court has held that the General Assembly is sovereign. I have endeavored to maintain that the people of the state are sovereign, and that when, through their delegates, they met in the constitutional convention, and later at the polls and ratified the home rule amendment, the sovereignty of the people was delegated, so far as 'local self-government' was concerned, so far as municipal affairs was concerned, to the municipalities of the state. Else what did they mean by the first half of section 3, 'Municipalities shall have authority to exercise all powers of local self-government.' If section 3 of article 18, known as the 'Home Rule Amendment,' was not intended to do that, then it is impossible to make language plain enough, patent enough, practical enough, that this court can understand it. What this court has done is to take the tail end of section 3, which relates only to state

affairs, that is to matters of general interest throughout the state, not local to a municipality, and tie that tail around the head of section 3 until they have choked the life out of it. . . .

"Indeed, the public utility corporations of Ohio have won a great victory in this decision. They are entitled to treat it with ghoulish glee. What they lost before the constitutional convention, what they lost at the polls when this amendment was adopted, they have more than won by the judgment of this court."

J. H. W.

EVERYDAY JURISPRUDENCE.—For about ten years the writer has been engaged in the teaching of law and during a longer period has been practicing law before the courts of Ohio and some other states. Some five years ago he formed the opinion that courses of study in law, political science, and ethics, were faulty in that they covered one or another of these subjects without placing emphasis on the intimate relation of the subjects to one another; indeed, without so much as attempting to show that ethics is a chief source of the others, or that one cannot be understood without a somewhat extensive knowledge of the others.

This opinion grew into a conviction, and he cast about him for light, and discovered that no college or law school contained in its curriculum any definite plan to teach the subjects in question so that their connection and relationship should be shown. Then he turned to books to find one or two that could be made profitably the basis of such a course, and found none that was written from that point of view. By this time he had made up his mind as to his needs, and chose, therefore, parts of many books and taught a class with the aim herein indicated. History was used to illustrate and prove the assertions made in class. The results more than justified the effort, if the opinions of the students and the discussion caused thereby in the community be any criterion.

The statements made by some noted scholars show the truth of the writer's main contention, but an examination of their books will disclose but little space given to it.

Francis Lieber says:

"The state is so intimately connected with nearly everything which concerns man, all our interests are so closely interwoven with its weal, that it cannot prosper, or fail of being a source of injury, without a faithful and correct discharge of duties on the part of every citizen. *The state (the greatest institution on earth) elevates everything that appertains to it, every duty, interest, or measure, into great importance, for the simple reason that it affects all, and, what with its direct and indirect operation, it very materially influences the moral well-being of every individual.* . . . The state, with its laws and government, affects materially the manhood of all living in it. Good laws elevate man; bad laws, if persisted in for a series of years, will degrade any society. Unfortunately, history and the existing state of many countries prove this truth so abundantly that it is useless to instance any facts": "Manual of Political Ethics," Vol. I, p. 79.

Thomas Jefferson says :

"I have proposed to you to carry on the study of law, with that of politics and history. *Every political measure will, forever, have an intimate connection with the laws of the land*; and he who knows nothing of these will always be perplexed, and often foiled, by adversaries having the advantage of that knowledge over him": Extract from letter to T. M. Randolph, Jr., July 6, 1787.

Sir Frederick Pollock says :

"In assuming a scientific character, law becomes, and must needs become, a distinct science. *The division of science or philosophy which comes nearest to it in respect of the subject-matter dealt with is Ethics*": "First Book of Jurisprudence," p. 45.

John Chipman Gray says :

"It is the failing of many advocates of codification to regard the law too much as a fixed product of statutes, precedents, and customs, and not to take into sufficient account the growth and change of the law. This growth and change is not a mere weaving of spider webs out of the bowels of the present rules of law; *a source of law, not the only source, but a source and a main source, is found in the principles of ethics. These principles, therefore, are legitimately a part of jurisprudence*, and the more the bounds of comparative jurisprudence are extended, the greater part will they play": Nature and Sources of the Law, section 657.

I have not overlooked the relation of law and economics, but my investigation disclosed a definite and pronounced effort on the part of the best teachers of economics, to include law, in many of its aspects, as a part of their courses. Law, ethics, political science, and economics are so closely related that a man is not qualified to teach one or practice another without a comprehensive knowledge of the others.

A law curriculum can be strengthened without extending the time by paying heed to what is said in advancing my main contention. What with the multiplication of books, and what with the division and sub-division of the law into topics and sub-topics, the students and schools are in the midst of confusion, and at the same time are trying to outdo each other in the number of "courses" pursued or offered. The sensible plan is to teach thoroughly the general and fundamental principles of the law; next to give adequate instruction in how to use books, and how to select and value precedents, authorities and cases; and then to spend a long time on what is commonly called jurisprudence. This latter, however, should be brought down to earth and made to consist of law, political science, economics, and ethics. The student may now be assigned special work in the leading subjects of the law, on which he reports fully, in order that his *knowledge, and his ability to use it*, may be tested. It is submitted that students so trained will be better equipped to practice law and to fulfill their duty to the community and to the courts than are those who have had a smattering of this "course" and that "course,"

each of which consists only of a sub-division or sub-topic of the law.

THEODORE A. JOHNSON.

Youngstown, Ohio.

INTERNATIONAL PRIVATE LAW—CONFLICT OF LAWS—CONATIONAL LAW—RIGHTS OF FOREIGN INCIDENCE.—Until we adopt the Chinese language which excels all others in its capacity to denote fine shades of distinction, we shall be obliged to worry along with inaccurate legal symbols which can not be understood apart from their application or without a paraphrase and sometimes a commentary. In the entire repertoire of the law no idea has been more richly endowed than that which bears such names as 'international private law,' 'private international law,' 'conflict of laws,' 'comity,' 'real and personal statutes,' 'collision of laws,' 'extra-territorial effect of laws,' 'application of foreign laws,' 'territorial limits of laws,' 'inter-municipal law,' 'private international jurisprudence,' 'polarized law.' Objections have been raised against each one of these terms, and it can not be doubted that they are all inaccurate. (See Holland, "Jurisprudence"¹¹ pp. 408 sq.; Dicey, "Conflict of Laws,"¹² Intro. pp. 12 sq.).

With the purpose apparently of entering the same field as the *Journal du droit international privé*, or the *Zeitschrift für internationales privat- und Strafrecht*, a new legal publication, after reviewing the failures in inventing a suitable name for the idea already thoroughly decorated with verbal embellishment, courageously goes to the heart of the difficulty of nomenclature by adopting the name, *The Journal of Conational Law* (New York). The underlying idea is that the branch of law in question, which is in no sense 'international law,' rests on a 'communis consensus,' on 'principes communes' which are admitted by all civilized states, and that "it is a part of the national law . . . already in part, and, tending as a whole, to become similar in substance to the like branches of law in other states."

This new word has the merit of emphasizing that the law in question is only a species of domestic law, but, for the rest, it is as defective as the names previously employed. The attribute which, it is supposed, resides in this branch of law, i.e., the tendency to become uniform throughout the world, is clearly not different from the same tendency toward uniformity found in several of the branches of commercial law. Many of the rules concerning sales, bills and notes, contract, etc., are, by the test proposed, as much to be regarded 'conational law' as the rules concerning 'renvoi.' By the same test, all the uniform acts adopted in the United States in recent years would be 'conational law.' Furthermore, if the name suggested were otherwise unobjectionable, it might be subject to the criticism that it is purely descriptive—that it tells us nothing of the field of legal rules which is embraced by 'conational law.'

It may well be that convenience is served by retaining the name 'conflict of laws' even though there is no 'conflict' in the law

assumed. It is unfortunate that 'conflict' and 'collision' are strong words. They imply integral counteraction, a clash. A less combative idea might have relieved in a measure a troublesome situation; for example, 'competition,' 'opposition,' or 'antagonism'—something short of actual hostilities. In fact, the term 'competition' was long ago used. In 1661 Paul Voet published his "*De statutis eorumque concursu*"; but twenty-five years later Huber employed the expression "*De conflictu legum*" and this usage is the one which prevails today.

Before we accept in despair Mr. Baty's metaphorical 'polarized' law, may we not hope to find, if not a single comprehensive adjective, at least a short accurate combination of words to express the idea intended? To that end we venture to submit for inspection, rather with the expectation of stimulating discussion than hope for approval, the phrase, Rights of Foreign Incidence. The term 'rights' is used in the extensive sense, including claims, immunities, privileges, and powers. In this sense, it is as broad as the law itself, since it embraces all jural relations. The term 'foreign' is used as synonymous with extra-territorial. In this sense, the political divisions of composite states are foreign to each other. The term 'incidence' means simply, as in physics, impingement or contact. Foreign incidence arises either because the right had its origin in another territory or because, though of domestic origin, an essential feature descriptive of the right comes into contact with another territory. For example, a contract may be made in a foreign state and enforcement sought here; or a contract may be made here looking to performance in another country.

We need not pause to state the considerations which have led to this selection, nor is it necessary at this time to anticipate objections, but it may be explained that we can not substitute 'law' for 'rights' since it is not the legal rule which has a foreign incidence—the rule is one of domestic law—but the right, i.e., a description of its content, in these cases goes beyond the territory of the sovereign, and because it does, requires a special application of law.

A. K.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION

189. *Question:* A and B, lawyers, were copartners. The partnership was dissolved by consent.

(a) Is it ethical, or consistent with professional dignity, for A to attempt to secure professional employment from a former client of the copartnership who had been originally introduced to the copartnership by B, and whose affairs had always been in the personal charge of B while the partnership continued—by offering to serve for fees much smaller than the reasonable and substantially uniform fees that had been charged to that client by the copartnership for the same kind of services?

(b) Would it make any difference if the instance cited were but one of a number, thus indicating a general policy on A's part

to secure, by means of "rate-cutting," employment by those clients of the former firm who, but for such "rate-cutting," would probably prefer to employ B?

Answer: Canon 7 of the Canons of Ethics of the American Bar Association provides, among other things, as follows:

"Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the bar" In the opinion of the Committee the principle stated is a correct one, and the circumstances suggested in the question make it applicable; and, consequently, make the practice reprehensible.

190. *Question:* Can a lawyer, who has been counsel for both husband and wife, with professional propriety warn the husband that the wife has requested him to draw her will so as to dispose of property in her name, but consisting of the fruits of the joint labors of husband and wife, in such manner that the husband shall have only a life estate after her death, with remainder to her descendants by a former marriage, with the deliberate design to prevent any part of it from inuring after his death to the benefit of the husband's relatives?

Or, can the lawyer, with knowledge so obtained of the wife's purpose, with professional propriety make a suggestion to the husband of the possibility of such a course, though not disclosing the fact that he has been consulted by the wife to that end?

The lawyer with knowledge of the circumstances having remonstrated with the wife, is unable to dissuade her from her purpose.

Answer: There are few exceptions to the rule that a lawyer must keep secret confidential communications from a client. In the opinion of the Committee, the facts set forth in the question do not come within any of the recognized exceptions, and, therefore, the lawyer cannot properly inform the husband of the fact; nor should he voluntarily make a suggestion to the husband of a possibility based upon his knowledge of a fact so obtained, but the lawyer, with respect to the husband's future conduct, is not precluded, if consulted by the husband, from advising him of the legal incidents of the transfer to his wife of the fruits of his labor.

191. *Question:* An action for damages resulted in a verdict for the plaintiff; thereupon a motion was made to set aside the verdict, which was denied by the Court with an opinion. No judgment has been entered, and no order denying the motion. Plaintiff and defendant and their respective attorneys have agreed that the defendant pay to the plaintiff the amount of the verdict upon condition, however, exacted by the defendant, that the plaintiff consent to the setting aside of the verdict.

In the opinion of the Committee is there any professional impropriety in a stipulation to that effect, or in securing an order in accordance with the stipulation?

Answer: In the opinion of the Committee, there is no professional impropriety in the situation, nor in securing an order in

accordance therewith; but the Committee expresses no opinion upon the legal side of the parties to secure such an order, or the duty of the court to grant it.

THE LAWYER AS A PROCESS SERVER.—The lawyer practicing in the suburban towns or rural communities of Illinois finds it practically impossible at times to have process served by constables. The reasons for this are many, but principally because the rewards for serving process are not large enough to attract a man to probably spend a half day to serve summons on some defendant located several miles away from the constable's headquarters, and it is not infrequent that because of this small stipend the objectionable type is attracted to this "office."

How can this condition be remedied? It would probably relieve the situation somewhat if all constables were salaried. In cases where the party to be served with process lives at a distance, or where it is difficult to reach him, the constable feels—and perhaps justifiably—that the fee provided is not sufficient for him to make the effort to get service. Here is one public office where better service could be obtained were it placed on a salaried basis instead of on a fee basis. Then, also, in rural communities, or small towns, where every man usually knows his neighbor, it is often difficult to get a constable to serve summons. However, a better solution would be to let the lawyer serve process. Why not? He is an officer of the court, bound by all the ethics and responsibility of the profession. He would have a personal interest in serving the summons expeditiously. If the fee paid to the lawyer were only large enough to pay for the gasoline used in his automobile in serving process, he would feel well compensated for his work in getting service. Also if the constable had a rival for this branch of his work, would it not spur him on to greater efforts?

We are loath to change the routine of our court machinery. However, here we could make a change that would be welcomed by the bar at large—let the lawyer be a process server. The states of New York and Minnesota, among others, have already fallen in line and permit lawyers to serve process. When will Illinois fall in line? This great state cannot afford to allow itself to fall behind New York or any other state of the Union in the advancement of progressive measures.

ALEXANDER D. KING, JR.

RES JUDICATA—CONDICTIO INDEBITI—ACTIO DOLI.—[Believing that the profession will be interested to see in a concrete fashion how cases are disposed of in other systems of law, the REVIEW will occasionally print the full text of foreign decisions. The following case is reported in *Entscheidungen des Reichsgerichts, Erster Band: 1880. No. 40.*]

Judgment, 12 Dec. 1879: Conclusions:

The defendant here, H, as plaintiff in the court of first instance obtained a judgment against B (defendant below and plaintiff here) which required B to pay H 500 fl. with interest sued for,

upon H's making the supplementary oath conditioned by the judgment. B did not take steps to revise the judgment, but H appealed to the Appellate Court and asked for an unconditional judgment. While the cause was pending in the Appellate Court, H informed the court that B had paid the amount sued for, including interest, and that only the costs remained unpaid. B admitted the payment, but asserted that it had been made solely on the false representation of H that the supplementary oath had already been made. The Appellate Court adjudged "that by virtue of the payment the judgment must be considered as satisfied and that the cause, so far as concerned principal and interest, was vacated, but that H should pay the costs in the courts of both instance" [the District Court of Weisbaden and in the Appellate Court]. The judgment for costs was based on the ground that H did not have a legal claim.

In this proceeding, B demands of H the sum of 500 fl., principal, and 60 fl., interest, and he alleges (1) that he paid these sums in error without being indebted, and (2) that he paid these sums under fraudulent representations made by H. Both of the judges below regarded the action as well-founded on the first point ('*condictio indebiti*') and as being an '*actio doli*.' The defendant was condemned to pay 560 fl. with a reservation of an oath to two defenses brought forward. Against this judgment the defendant makes a complaint of nullity on the ground that the law as to '*condictio indebiti*' and the legal effect of judgments has been violated.

The complaint of nullity must be considered as well-founded. The action to compel repayment of money paid through mistake ('*condictio indebiti*') is based on the theory that nothing was due. The plaintiff must allege and prove that he was not indebted. In this cause, the plaintiff, B, has alleged that he satisfied the debt originally owing by him amounting to 500 fl. by payment in accordance with an order to him, to a certain K, and that, accordingly, at the time of the original action against him he was not indebted. H controverted this and brought forward a number of defenses. The allegations made and the proofs adduced on both sides are the basis of the decision below that B was not indebted. But this procedure is contrary to the principle which governs the legal validity of a judgment. The same question between the same parties has already been litigated. It was adjudicated that H was entitled to the 500 fl. with interest and the right of H cannot be drawn in question again.

The particular manner in which the previous action was disposed of raises no doubt. It is true that the final judgment of the court of first instance was made conditional upon the oath of H, yet H attacked the judgment, and the court, on his showing that the principal sum and interest had been paid, vacated the action with a judgment against H for costs. This decision cannot be thought of other than as disposing of the controversy. The former Appellate Court judge regarded the unconditional payment of the amount sued for as a subjection to the claim or of the judgment

of the court of first instance, and as such the payment must be considered, since it was a satisfaction of the above judgment. Subjection to a claim which is similar in essence to the ancient 'confessio in iure,' the well-known substitute for a valid judgment, has precisely the same operation as the latter—it cannot be questioned that satisfaction of a judgment without condition and without force is legally conclusive. Therefore, the attempt to litigate the same matter between the same parties was error. This follows from the general rules concerning the effect of judicial acts. This is sufficient whether the familiar rule of Roman law that the 'condictio indebiti' is not available to recover a payment made pursuant to a judgment still prevails (cf. D. 5, 1, 74, 2 (de iudiciis); D. 17, 1, 29, 5 (mandat.); Cod. 4, 5 (de cond. ind.)), and, likewise, whether the plaintiff may have any other remedy.

[So far as the suit was based on 'actio doli,' the court finds that there was no fraudulent representation.]

OUR CONTRIBUTORS.—Orrin N. Carter has been justice in the Supreme Court of Illinois since 1906. (See "Illinois Judicial Who's Who," REV., XIV, 427.) George Packard and John T. Richards are prominent members of the Chicago bar.—Ed.

BOOKS AND PERIODICALS

CONFLICT OF LAWS RELATING TO BILLS AND NOTES. By Ernest G. Lorenzen, Professor of Law in Yale University. New Haven: Yale University Press, 1919. Pp. 327.

The first part of the the book is a comparison of the Anglo-American law of bills and notes with the provisions of the uniform law adopted by The Hague convention of 1912. That convention, though not ratified by any of the signatory powers, expresses, the author states, the general point of view prevailing in foreign countries, and may, therefore, properly serve as a basis of comparison between Anglo-American law and that of other countries. The author points out that The Hague code deals merely with the formal requirements of bills and notes and does not, as do our uniform Negotiable Instruments Act and the British Bills of Exchange Act, furnish a more or less complete code of the entire law of bills and notes.

The author states that though the law of this subject, developed as it was from mercantile custom, had a common origin, yet it assumed a great variety of forms in the different countries. Even in recent times there were no fewer than forty different bills of exchange acts outside Anglo-American countries. These various systems fall into three main groups—the French, the German, and the Anglo-American. The differences between the Anglo-American system and the other systems are numerous and striking. For instance, in not a few countries provisions for payment of interest were not permitted, and, if inserted, either made the instrument invalid, or else were inoperative. The Hague uniform law permitted stipulations for interest in bills or notes payable at sight or at a certain time after sight. In many continental countries bills and notes payable in instalments are void. In some, provisions for exchange, costs of collection, and attorneys' fees, either render the instrument void, or are inoperative.

The Hague uniform law provides that the parties may stipulate for payment in a specified foreign country other than that where the instrument is payable. The author states that under Anglo-American law such instruments would not be bills or notes. This statement appears to be erroneous. See *Black v. Ward*, 27, Mich. 192; *Hogue v. Williamson*, 85 Texas 553; Story "Promissory Notes," sec. 171. But see *Thompson v. Sloan*. 23 Wend. 71

Bills of exchange payable to bearer, though of almost equal age with those payable to order, were prohibited in France in 1716, and are now allowed in none of the continental countries, though promissory notes payable to bearer are allowed in the French group.

In countries of the German group, by law of comparatively recent development, an express designation of the instrument as a bill or a note is required.

The Hague uniform law, following continental law, requires that a bill or note be dated, that it specify the place where drawn or made, the place where payable, that it be made payable at a fixed date, or at certain time after sight. The Hague uniform law has a provision similar to section 16 of our uniform negotiable instruments law prohibiting the defense of want of delivery of a completed instrument as against a holder in due course. Section 16 was one of the few radical departures from existing law effected by our uniform negotiable instruments law and has been subject to some criticism. Under prior law, a party, if not guilty of negligence, could take advantage of the defense of want of delivery, even as against a holder in due course. The Hague law provides that in case the amount is differently set forth in different places in the instrument, the sum payable shall be the smaller sum. The author says the bills of exchange act and the uniform negotiable instrument act are silent on the subject. But section 17 of the latter act and section 9 of the former provide that if the amount is specified in words and figures the former shall control in case of a discrepancy.

The provision of The Hague law as to one who without authority executes a bill or note in a representative capacity is the same as those of section 20 of our uniform negotiable instruments law (and section 26 of the B. E. A.). Both laws make the person so signing liable on the instrument. This is in accordance with German, but contrary to the continental law elsewhere and to Anglo-American common law, according to which the person would be liable, not on the instrument, but only in an action for damages for deceit or breach of warranty of authority.

A fundamental distinction between continental and Anglo-American law is with respect to the necessity of a consideration. Apparently in Blackstone's time a bill or note was treated as a "specialty" like a bond, and did not require a consideration. Of course it is now well settled that bills and notes, like simple contracts, require a consideration, though, in the case of bills and notes, a consideration is *prima facie* presumed and need not be pleaded, and though want of consideration is not a defense as against a holder in due course. Under continental law, a consideration is not necessary even between immediate parties.

The author states that the laws of the continental countries with respect to indorsement differ from each other and from Anglo-American law. Under French law only special indorsements payable to order, dated and reciting the value received are permitted (except with respect to checks as to which blank indorsements are permitted). A blank indorsement operates only as a power of attorney to collect the instrument.

Under continental law all dishonored bills must, unless protest be waived, be protested (in order to charge secondary parties) while under Anglo-American law only foreign bills need be protested.

Another marked difference between Anglo-American law and continental law is that under the former, refusal to accept gives rise to an immediate right of recourse against the drawer, while under the latter, the drawer may furnish security and thereby postpone recourse on the bill until the date of payment.

The author notes differences between Anglo-American law and continental law with respect to the date of protest for non-payment, the former requiring protest to be made or noted on the date of maturity, while the latter allows a greater latitude. The author notes wide divergencies between Anglo-American law and continental law with respect to notice of dishonor. Under the former the notice of dishonor given within a prescribed time is essential to charge secondary parties, while under the latter if the instrument has been duly protested a failure to give notice merely entitles the drawer or indorser to damages against the holder for any loss thereby resulting. Considerable differences are pointed out between Anglo-American law and continental law as to excuses for failure in respect to presentment, protest and notice of dishonor, the former being less strict in this regard than the latter. Under Anglo-American law the holder in general loses all right of recourse against secondary parties where he has failed to exercise due diligence with respect to presentment protest or notice, while under continental systems of the German group he has a quasi-contractual remedy against a drawer or indorser who would otherwise be unjustly enriched.

An importance difference between Anglo-American and continental law exists in the case of forged indorsements. Under the former the holder's title, even though he took for value and without notice, is defeated if any of the indorsements through which his title must be traced is forged. Under the latter, the holder's title would be good unless he were guilty of fraud or gross negligence in taking the instrument. Similarly, under continental law a drawee paying a bill or check at maturity to a holder under a forged indorsement is protected if free from fraud or gross negligence. Under Anglo-American law, the contrary is, of course, true, though under section 60 of the English Bills of Exchange Act a bank is protected in paying to a holder under a forged indorsement an order check or demand draft, if the payment is made in good faith and in ordinary course of business.

The author points out differences between The Hague uniform law and Anglo-American law as to acceptance and payment for honor, bills drawn in set, effect of stamp duties, etc.

Part Two of the book is devoted to the rules of conflict of laws relating to bills and notes. In chapter 1 of that Part he discusses the special subject of capacity. After stating the various rules that have been adopted by various countries or suggested by writers, e. g., rules making the question of capacity depend on the law of the country of which the party is a subject or a citizen, or on the law of his domicile, or on the place where the contract is made, or is to be performed, the author pronounces in favor of an alternative rule which would as between the law of the domicile and

the law of the place of contract apply the law which would sustain the capacity to contract. He adopts this view as tending toward greater uniformity of international law, though he admits that if a strictly national or local point of view is taken, the greater simplicity resulting from applying only the *lex loci contractus* should exclude the application of any other law. It may be noted in passing that our Supreme Court has recently held that capacity depends solely on the *lex loci contractus* and not on the law of domicile or place of performance: *Burr v. Beckler*, 264 Ill. 230. The author thinks that the question of conflict of laws with respect to capacity turns upon quite different considerations from those applicable to the validity of the contract itself.

With respect to commercial paper, the author, after a survey of comparative law on the subject, favors making the *lex loci contractus* controlling with respect to the formal validity. Though with respect to ordinary contracts, he favors an alternative rule, applying, as between the *lex loci contractus* and the *lex solutionis*, whichever law will sustain the contract.

The author discusses the validity of later supervening contracts (such as acceptance or indorsement) made with respect to a bill or note invalid as to form under the *lex loci contractus*, and favors the adoption of a statutory rule (similar to that embodied in section 72 of the English Bills of Exchange Act), making such contracts valid where the instrument conforms with respect to formal requirements to the laws of the place where the supervening contract is made.

The author discusses the question of conflict of laws with respect to the interpretation of the instrument, the liability of the parties, and the defenses available, and he favors the application of the *lex loci contractus* as against the *lex solutionis*.

Another interesting problem discussed by the author is the applicable law with respect to supervening obligations. Should the law of the place where the instrument was issued control as to nature and extent of the obligations assumed by persons who accept or indorse the instrument in another state or country. Although the obligation assumed by acceptor and indorser are new and in a sense independent obligations, yet they are superimposed upon the original instrument and are in furtherance of its object. Should the law of the place of original issue of the instrument or the law of the place where the supervening obligations are assumed control, or should the law of the place of payment control?

The author favors the rule adopted in the English Bills of Exchange Act (section 72) by which the effect of the drawing, indorsement, or acceptance is determined by the law of the place where such contract is made. He would, however, limit this rule by making the law of the place of the issue of the instrument controlling with respect to the nature and extent of the supervening obligation, in so far as these are dependent upon the nature of the original instrument. Thus, for instance, he would hold to the obligation of an indorser of a negotiable instrument, one who in-

dorses in New York a bill of exchange, payable to a particular person, without words of negotiability ("order" or "bearer") issued in England, bills in that form being negotiable under the English bills of exchange act and non-negotiable under the uniform negotiable instrument act in force in New York. Unless the law controlling the effect of the instrument when issued is applied the instrument would (or might) change its character, back and forth from that of a negotiable instrument to that of a non-negotiable instrument as it traveled from country to country. As the author states, the acceptor's or indorser's "willingness to become a party to the instrument implies, of itself, a readiness to contract on the basis of its original character."

The author discusses the problem involved where a negotiable instrument issued in a country is transferred in a manner valid in another country where the transfer was made, but invalid under the law of the place of issue. This question arose in the case of *Embiricos v. Anglo-Austrian Bank*, C. A., 1905, 1 K. B. 677, where an order check drawn in Roumania on an English bank was negotiated in Austria under a forged indorsement, the indorsee taking in good faith and without gross negligence, the Austrian law protecting an indorsee taking in good faith and without gross negligence. It was held that the holder whose indorsement was forged could not recover in trover against a remote indorsee to whom the check was finally indorsed in London, the court applying the *lex rei sitæ*, to sustain the title under the Austrian indorsement. Apparently the same law would have been applied had the suit been against a maker or acceptor. The author is inclined to favor a rule which would apply either the law of the place where the instrument is issued, or the law of the place where the indorsement is made, whichever would sustain the title of the indorsee.

What law should control in determining who is a "holder in due course"? The author points out that the notion of a holder in due course is unknown to the continental law under which a purchaser will acquire a title free from personal defense if he took in good faith. The author favors applying the *lex loci contractus*, as against the *lex loci solutionis*, or the law of the place of indorsement in determining whether or not a person is a holder in due course, taking free from defenses, with possibly an alternative application of the law of the place of the indorsement where that law is more favorable to the rights of the holder, than the *lex loci contractus*. Illinois applies the *lex loci contractus*: *Stacy v. Baxter*, 1 Scam. 417; *Evans v. Anderson*, 78 Ill. 558: to determine what defenses are available against a holder in due course.

With regard to presentment for acceptance or payment, and protest, the law of the place of payment is everywhere regarded as controlling with respect to the mode in which and the time within which these shall be done. No other rule would be practicable, as the persons attending to these matters could not in the nature of the case be expected to know the various laws of the various places where a foreign bill might be drawn or indorsed. With regard to

the general necessity of presentment, protest, and notice, in some form, in order to charge drawers and indorsers, the law of the place of drawing or indorsement controls (the *lex loci contractus*): *Amolink v. Rogers*, 189 N. Y. 252; 8 C. J. 102. With regard to the mode of notification of dishonor, the author favors the application of the law of the place of payment on considerations of convenience. Our law makes the requirements as to notice depend on the law of the place of indorsement: *Zay v. Raney*, 89 Ill., 220, 21.

An important and interesting question discussed by the author is the effect of moratory laws at the place of payment. This question has been brought into prominence by the great war, and the moratory laws passed in consequence thereof by most European countries. The author, in agreement with the more generally accepted view, would make the moratory laws controlling with respect to the time for presentment for payment, in order to charge drawers and indorsers in other countries, whether the moratory law prohibited presentment before the end of the moratorium, or whether it merely postpones the period of maturity or the time for presentment and protest.

The author discusses the comparative law with respect to damages by way of interest, re-exchange, etc., recoverable in case of dishonor against drawers or indorsers, acceptance and payment for honor, and also the subject of "renvoi." As to the latter, the author favors rejecting the doctrine of renvoi and adopting the view more generally accepted in Anglo-American countries, that in applying the law of a foreign country, the court will apply the ordinary internal law of that country and not the law of that country on the subject of conflict of laws. For instance, if the law of the country applied would make the instrument non-negotiable, the court will treat the instrument as non-negotiable, though the rules of that country with respect to conflict of laws would refer the subject of negotiability to the laws of another country under which the instrument would be deemed negotiable. Thus if the court where the controversy arises by its rules relative to conflict of laws applies the *lex loci contractus*, it will still apply that law, though the rules of the place of contract would apply the law of the place of payment. The unsoundness and the practical inconveniences of the doctrine of renvoi are well set forth in an able article by Ernst Otto Schrieber, Jr., entitled "The Doctrines of Renvoi in Anglo-American Law," *Harvard Law Review*, XXXI, 523.

The book contains as appendices the text of the Uniform Negotiable Instruments Act, the English Bills of Exchange Act, and the convention of The Hague, and the Uniform Law (the French text with an English translation). There is also a comparative table of these codes and a bibliography, followed by a rather unsatisfactory index. In view of the growing importance of foreign law by reason of our rapidly increasing foreign commerce, this work, prepared by one having a mastery of foreign systems of law as well as of our own, should prove of much practical value.

L. M. G.

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THE ILLINOIS BENCH AND BAR IN 1867

By EDWIN M. ASHCRAFT

Illinois is a large state and an article on the bench and bar at the time Judge James H. Cartwright began practicing law in 1867 to be comprehensive would take more space than is now available.

I believe it is the general consensus of opinion that the bar of a district establishes the standard of its judiciary. This rule may not apply at all times on account of political and other influences. Judge Cartwright located at Oregon, county seat of Ogle County, Illinois, in 1867. That locality was then essentially an agricultural district.

Libraries were scarce. The better libraries were limited to Blackstone, Kent, Story's "Equity," Williams on "Real Estate," Greenleaf on "Evidence," and Chitty's and Gould's Pleadings. There were about thirty-eight volumes of Illinois Supreme Court Reports available to those who were able to purchase them at five dollars per volume. Wood and Long that year, 1866-1867, published a digest of Illinois Reports in one volume. The last general revision of the statute was by W. H. Purple of Peoria, Illinois, in 1856. The session laws supplemented the statute of 1856. Judge Scates published a compilation in 1858 which was not generally used, and the next revised statute was by Gross in 1868-1869. This work contained some annotations. I have heard that about that time there was a digest of the Supreme Court decisions of Indiana and Illinois, but I never saw a copy. A goodly number of able lawyers from the East located in Northwestern Illinois in the early days and occasionally brought with them a few copies of the current reports of the states from which they came, and there was occasionally a broken set of English reports.

By the constitution of 1818, under which the judges of the Supreme Court were appointed, originally three were appointed,

and later nine by subsequent acts of the legislature authorized by the constitution. The judges were commissioned by the governor. The judges of the Supreme Court chosen in this manner did the Circuit Court work. A number of them were excellent judges, but the fact that they were compelled to do *nisi prius* work necessarily interfered with their efficiency as Supreme Court judges and a few of the number seem to have been of little value as Supreme Court judges. Indeed it is said the statute requiring the court to instruct juries in writing was passed on account of the disagreements between one of these judges and members of the bar as to the language of his oral instructions to the jury. The constitution of 1848 provided for the election of three Supreme Court judges, who were not required to do any *nisi prius* work, and by an election on September 4, 1849, Samuel H. Treat, John D. Caton, and Lyman Trumbull were elected judges of the Supreme Court and superseded the nine judges who were acting under their appointment under the constitution of 1818. Judges Caton and Treat were, when elected, acting under their appointment under the constitution of 1818, so that when Judge Cartwright commenced practice in 1867 the Supreme Court consisted of three members, namely, Pinkney H. Walker, Sidney Breese, and Charles B. Lawrence, and this continued until the number was increased under the constitution of 1870. A number of prominent lawyers were judges from time to time of the circuit in which he was located. William W. Heaton, who was the first presiding justice of the Appellate Court of the First District, was the judge of the circuit in Ogle County at the time Judge Cartwright began practice. Among the prominent lawyers of that section at that date may be named Walter Stager of Sterling, William Lathrop of Rockford, Thomas Turner and Martin T. Sweet of Freeport, Joseph Knox of Rock Island, John V. Eustice, William Barge and J. K. Edsall of Dixon, and Edward F. Dutcher of Oregon. These, with many others of equal ability, but possibly not as much prominence, were contemporaries of Judge Cartwright.

Judge Bailey was for many years circuit judge and served a number of years on the Appellate bench and was later chief justice of the Supreme Court. Mr. Eustice was elected judge of the Circuit Court. Mr. Edsall was elected attorney-general.

In the early years of the experience of Judge Cartwright at the bar the practice in his neighborhood was very much like the practice in other portions of the state, especially in the strictly agricultural parts. The contested litigation comprised principally

criminal cases, of which there was apparently a less proportionate amount in this district than in some others, litigation growing out of errors in surveys, section and quarter-section lines, location of roads and highways, and trespasses by cattle.

I have in mind a case coming within my observation in the early practice in Illinois, where a tenant while occupying a farm, cut and placed in the road in front of his house a block to be used by ladies in mounting horses. When his term expired he gave the block to the owner of the adjoining farm, who moved it to his place. The landlord on discovering the removal of the block proceeded at once to replevin it and insinuated that it had been stolen. No witness estimated the value of the block at more than twenty-five cents. The case was tried before a justice of the peace, where most of the neighbors testified, and was appealed to the county court, where it was tried on two occasions, resulting in a disagreement or new trial and the venue was changed to an adjoining county. In the last trial before the change of venue, the evidence of a number of neighbors was impeached and an equal number of neighbors testified to their good reputation for truth and veracity. A slander suit was instituted and prosecuted vigorously. Prominent lawyers were finally engaged in the trial on the change of venue, as the costs, witness fees, etc., had reached several thousand dollars, a survey was made to ascertain on whose land the tree grew from which the block was cut, whereupon it was ascertained that it was in fact cut from the land of the farmer to whom it was given by the tenant, and thereupon he claimed to be the owner when it was given to him by the tenant. The case involved, and there were raised and argued in the case, a great variety of questions—possession, reversions, remainders, trespass *quare clausum fregit*, etc. The case resulted in a verdict and judgment for the defendant, reasonable compensation to the lawyers and the insolvency of the litigants or one of them.

In the early days in Illinois the vacant lands were considered public common and it was the duty of an owner to fence his land if he did not want it used for public grazing. In other words, it was the prevailing sentiment throughout most of the state that an owner of cattle should let them range on the unfenced lands and that those who wanted to raise crops should fence the crops. Mr. Stager mentions that this was the cause of a great amount of litigation. Cattle would break into a corn field and the owner of the corn field had no protection except a dog. The cattle in being chased out by the dog would injure the crop and the owner of the

land would sue the owner of the cattle for damages and the owner of the cattle would bring a counter action against the former for damage done to the cattle by the dog and by chasing. On account of animals running at large, much confusion arose as to ownership and a great number of replevin suits were brought for cattle, horses, calves, and sheep, and whole neighborhoods would be subpoenaed to the court to testify as to the identity of the animal. A great proportion of the suits brought were intended to vindicate the honesty and integrity of the plaintiff and were defended vigorously for the same reason by the defendant. Most of the cases brought were tried. There were a goodly number of libel and slander suits; very few divorces; very few foreclosures; the usual amount of suits for debts and a comparatively small amount of probate work as the country was new and the settlers had not come to the time of life when probate courts had much jurisdiction of them. For the most part the litigation did not involve large sums of money, but this kind of general practice called for careful and studious reading of authorities and presented a variety of questions that would not occur to the ordinary practitioner of today. The variety of the litigation prevalent through agricultural districts of Illinois was calculated to develop good lawyers and men who were resourceful in the trial of cases. Most of them were good common law pleaders. The Hilary rules were never adopted as a part of the common law of Illinois, and pleadings were required to be well drawn and accurate. Amendments were troublesome and if allowed meant delay.

Until the Burlington railroad was located and constructed through Ogle County, Oregon had no railroad connection and it was not until about that time that the ability of Judge Cartwright attracted general attention. For a time Judge Cartwright's engagements required him to keep an office at Aurora and subsequently in Chicago, and as I recall he was in Chicago regularly at the time he was first nominated for circuit judge. He enjoyed a lucrative practice and accepting the office of circuit judge was a great sacrifice and made wholly out of consideration for the public. The call upon him to go on the bench was almost unanimous and his election and re-election from that time to this has been a recognition of his careful and studious reading of the law, his quick perception, open-mindedness and quick grasp of situations, and a reputation for integrity, fair dealing and fearlessness, which has been the admiration of all who have known him. I believe in all the years Judge Cartwright has been on the bench, he has never been a candidate in the sense that he was seeking office; that he has never attended a convention

at which he was nominated. He started his preparation under Judges Cooley and Campbell at the University of Michigan, which he entered soon after his discharge from the army in 1865 and from which he graduated in 1867. He pursued his studies continuously, preparing every case entrusted to him with great care and detail, and on the bench was always patient and willing to hear and consider every point counsel desired to present, ever courteous and never giving a hasty or ill-considered decision. His opinions at this date are found in 132 volumes of the Illinois Supreme Court Reports and in a number of Illinois Appellate Court Reports. It should be noted that Judge Cartwright has written more opinions, possibly, than any other man now occupying a judicial position. He is responsible to a larger degree than any other individual for the law as held by the Supreme Court of Illinois.

CLASSIFICATION OF OBLIGATIONS

BY HENRY W. BALLANTINE

The precepts to which Justinian's Institutes reduce the whole doctrine of the law are these: "To live honestly, to do hurt to no other, *to render every man his due.*" The law of torts and of crimes has for its main purpose the working out of the negative precept, "Thou shalt do no hurt to thy neighbor."¹ The positive precept, "Thou shalt render every man his due," is the sphere of the law of obligations.

The law of obligations is thus contrasted with the law of torts, dealing with the requirements of positive duty and claims to benefits, as compared with negative duties to injure no one and avoid torts. The law of obligations may be co-ordinated with the law of property, the law of torts, the law of crimes, the law of personal relations, the law of procedure and constitutional law as one of the main departments of our legal system. "Obligation" was first adopted in the common law merely to signify one species of obligation, viz., a bond; but the term is now commonly used by judges and legal writers in the wide generic Roman and civil law sense, as embracing all claims reducible to a money value, or proprietary rights in personam, contractual and otherwise. It is necessary to adopt as a main head the law of obligations rather than the law of contracts, as contracts are only one species and do not include a wide variety of non-contractual obligations such as quasi contracts, statutory duties, and equitable claims.²

An obligation may be broadly defined as a claim arising from some particular relation between two parties, or groups of parties, resulting from the declarations or conduct of one or both, which entitles one of them to demand of the other some definite act or forbearance.³ Obligation is properly used to denote the entire legal relation of claim on one side and correlative duty to perform on the other. From the point of view of the obligee it is a right; from the point of view of the obligor it is a duty. The elements of an obligation involve: (1) a creditor side and a debtor side; (2) a claim and a debt; (3) a claim to require a certain performance of a definite

1. Pollock, "Torts" (10th ed.), p. 2.

2. See Moyle, "Institutes of Justinian" (3rd ed.), Excursus V to Book III, p. 481.

3. Pollock, "First Book of Jurisprudence," p. 87.

person and a duty of that person to render it; (4) a power to enforce performance or a substitute for it, and a corresponding liability.⁴ All obligations are imposed by law operating on certain facts which bring the parties into some relation which is regarded as giving one a just claim on the other.

As Pollock and Maitland say, it is a clumsy struggle that the idea of obligation has had to make to find its true place in our legal system.⁵ Nearly the whole subject of legal obligations has been forced under the head of contracts, because of the common law scheme of forms of action. All personal actions were classed either as *ex delicto* or *ex contractu*. Thus the Illinois Supreme Court says, in an interesting opinion, *Highway Commissioners v. Bloomington*:⁶

"By the common law the word 'contract' included all rights which could be enforced by any of the actions *ex contractu*. . . . Taking from the general mass all of the rights growing out of express contracts which were enforceable by actions *ex contractu*, we have left a miscellaneous group of rights which are enforceable by actions *ex contractu*, which are usually treated under the classification of implied contracts. . . . After subtracting express contracts and contracts implied in fact, there is still left another large class of obligations to enforce which the action of general *assumpsit* is a well-established remedy."

Since many obligations arise where there is no contract, non-contractual obligations have to be drawn into the realm of contractual remedies by the useless fiction of implying a promise to perform them. From this comes the absurdity of calling a judgment a contract of record, since a judgment creates a debt, and upon a debt the law implies a promise to pay it.⁷ It will clarify legal thinking if obligations can be classified on some comprehensive and rational basis, such as the intrinsic nature of the transactions, or relations in fact from which they spring.⁸

Obligations may be classified in two different ways. The main division is according to the method by which their terms are defined or declared. Every obligation is created by law, but its terms must be defined and marked out either by the parties or by rule of law, and there must be some reason in fact for creating it. Obligations may be declared by the parties, either by one or by both, and either

4. *Gareis*, "Science of Law," p. 159, n. 1; *Anson*, "Contracts," Pt. I, sec. 2.

5. *Pollock and Maitland*, "History of English Law," II, p. 207.

6. 253 Ill. 164, 171.

7. See *Terry*, "Leading Principles of Anglo-American Law," p. 480.

8. See *Moyle*, "Institutes of Justinian," Book III, Tit. 13, sec. 2, p. 396, notes.

by acts or by words. Obligations may on the other hand be prescribed by law, which casts a positive duty on one of two persons, either by interpreting some natural claim arising from some relation into which the parties have come, or by positive rule to effectuate some public policy or regulate a business. The first sort arise from legal transactions or "acts in the law," and the second do not.⁹

Another basis of classification is according to the nature of the source, ground, reason or transaction from which the obligation arises. In this paper, the main classification is according to the method in which the terms are marked out and declared, and the subsidiary classification is based on the source of obligation. The classification, in general, will then be as follows:

I. *Obligations Arising from Legal Transactions or Declarations of Will:*

1. Bilateral declarations of intent or agreement to assume an obligation (herein of consideration and its varieties).
2. Declarations of will of one person to assume an obligation (unilateral acts in the law, such as bonds and declarations of trust).
3. Concurrent declarations of two persons which fail of a mutually intended act in the law ("no-meeting-of-the-mind-implied-in-fact-contracts").¹⁰

II. *Prescribed Obligations:*

1. Obligations prescribed on the basis of unlawful or unjust conduct such as retention of benefit, or misappropriation of property by the obligor. These are obligations ex maleficio (quasi contracts and constructive trusts).
2. Obligations arising from injurious reliance caused by (1) misrepresentations (warranty and estoppel); (2) gratuitous undertakings.
3. Obligations arising from holding the property of another as in case of bailees and fiduciaries.
4. Obligations arising as burdens incident to the acceptance or holding of property (covenants running with the land).
5. Remedial obligations to rectify wrong:
 - (1) Breach of contract;
 - (2) Torts (violation of rights in rem);
 - (3) Quasi contractual rights of action;
 - (4) Constructive trust liabilities.
6. Obligations incident to public callings by which the business is regulated.

9. Pound, "Readings Hist. and System Com. Law," chap. xi, p. 508.

10. Costigan, Harvard Law Review, Vol. XXXIII, p. 376, 390.

7. Obligations of public office.
8. Obligations of family relations of a proprietary nature.
9. Insurance obligations to apportion risk of loss from human activities:
 - (1) *Respondeat superior* (responsibility of master for servant);
 - (2) Responsibility for dangerous conditions and accumulations.¹¹
 - (3) Responsibility for animals.
 - (4) Miscellaneous positive duties as those imposed on eating-house keepers, or on manufacturers of dangerous articles apart from privity, and irrespective of negligence.¹²
10. Obligations judicially declared.
11. Statutory obligations.

In the common law torts form a separate and individual branch of the law, dealing with general duties fixed by law. In the Roman and civil law the law of torts is less developed than in the common law; and torts are looked at from the remedial point of view of obligations arising *ex delicto*. This classification is adopted by some English and American jurists.¹³ It is customary with us, however, to look at torts rather from the point of view of primary rights and duties and to treat the right of action as incident to the primary rights. It is indeed doubtful whether obligations *ex delicto* have any place in the common law. Such a conception seems superfluous, as we do not think of the wrongdoer becoming a debtor to the injured person. We do not need to treat obligations arising from breach of contract separately from contractual rights, as right and remedy go together.¹⁴

It is indeed sometimes difficult to draw the distinction between contract or obligation rights and tort rights. In some cases one may elect to sue on a tort or a breach of contract theory, as in the case of a warranty in sales, or on claims against common carriers, innkeepers, telegraph companies and bailees.¹⁵ This usually means that the same facts give rise to tort liability for a wrong, and also to a claim for breach of obligation for which a contract remedy is available.

11. *Rylands v. Fletcher*.

12. *California Law Review*, Vol. VII, p. 360.

13. *Jenks*, "Digest English Civil Law," Book II, "Obligations."

14. See *Terry*, "Leading Principles of Anglo-American Law," secs. 132, 142, 143, 150, 154, 511.

15. *Page*, "Contracts" (2nd ed.), I ch. iv.

A close approach of tort and positive duty may also be seen in the duties of insuring safety arising from the creation of unusual risks, or the employment of a servant.¹⁶

It has been suggested that negligence may be regarded as the breach of a positive duty or obligation to exercise care and diligence to secure the safety of others. This is particularly so where a person assumes or undertakes to do something for another, and by this assumption comes under a duty to act with reasonable care, skill, and prudence. There is some tendency to recognize an obligation in the nature of mandate in the common law, resulting from the voluntary undertaking of an employment, or assuming the transaction of certain business where a relation of dependence is created, in which misfeasance, or even non-performance, would result in harm, and where affirmative action is necessary to avoid being the responsible cause of damage to another.¹⁷ The action of *assumpsit*, sounded in tort for negligent injury to the plaintiff or his property after assuming to act for him, and inducing plaintiff to rely on the defendant.¹⁸ There is thus in some cases an affinity between the torts of deceit and of negligent non-feasance and misfeasance, and breach of obligation.

The most fundamental division of obligations may be indicated by the terms *consensual* or *declared* on the one hand and *prescribed* or *constructive* on the other. "*Consensual*" indicates that the declaration of will or assent by one or both parties, expressed or implied, enters as at least one of the elements of the transaction which creates the obligation and fixes its terms. Additional ingredients, like consideration or seal, may be required, but the characteristic and essential thing is that the obligation is consensual, the result of the free declaration of the will of the obligor indicating the terms of the undertaking, either alone or concurring with that of others. *Prescribed* obligations will include all those which are fixed and imposed by law regardless of expression of intent or voluntary assumption, such as quasi contracts and constructive trusts. The terms *constructive* or *imputed* might be preferred as indicating that the obligation is derived by construction or interpretation of law, that is by construing the legal effect of the facts, conduct and circumstances as contrasted with what the parties voluntarily express or under-

16. Terry, "Leading Principles of Anglo-American Law," secs. 136, 137, 486, 487.

17. Street, "Foundations of Legal Liability," Vol. I, pp. 91, 94, 129; Vol. II, p. 237.

18. Williston, "Contracts," Vol. I, p. 191; Pollock, "Torts" (10th ed.), p. 553.

take. It is defined by rule of law according to what justice or policy requires, and is fastened upon the obligor by construction or operation of law. The terms "recusable" and "irrecusable" have been suggested by some writers to express this distinction.¹⁹

Even in contracts and other consensual obligations the duties of the parties are far from being measured by the terms of the agreement alone, but are prescribed by rules of law, as in case of implied conditions and impossibility of performance. This is clearly pointed out in *Nevin v. Pullman Palace Car Co.*²⁰ where the court says in substance, that the law silently annexes to many contracts, especially those which establish peculiar relations between the parties, certain conditions and duties which are not in express terms provided for in the contract but which, nevertheless, are regarded as contractual. These duties arise ex lege out of the relation created by the contract.

A. CONSENSUAL OBLIGATIONS

The most important class of consensual obligations are those which arise from contracts. Contracts may be classified according to the grounds or reasons upon which the law recognizes the promise, agreement, or declaration of intent as binding.

1. *Formal contracts.* In early common law the only promise that was given obligatory force was the formal promise expressed in a document under seal. The promise became binding from the expression of intent to be bound in ceremonial form.²¹ Intent to be bound is expressed partly by signing and sealing and partly by delivery, which includes acts or words expressing the intent to put the document into force and effect. The consummation of the contractual transaction thus rests to an astonishing degree upon parol evidence, often of interested witnesses.²²

As is said by Dean Pound in his valuable article on "Consideration in Equity,"²³

"Roman law did not enforce a promise or pact as such. To induce the law to act, he (the plaintiff) must show that he was entitled to a remedy which the law annexed to some formal situation. . . . Unless clothed with the form of solemn declaration before witnesses with coin and balance, or the solemn question and answer, using the sacramental words 'spondeo' or written entries in the household books, there was but

19. See *Wigmore*, Harvard Law Review, Vol. VIII, p. 200; *Harriman*, "Contracts" (2nd ed.), Appendix.

20. 106 Ill. 222, 228, 233.

21. See *Pollock and Maitland*, "History of English Law," II, p. 219.

22. See by the writer, "Escrows," Yale Law Journal, XXIX, 826.

23. ILLINOIS LAW REVIEW, XIII, 667, 682 (450).

natural, not legal, obligation. In other words, the strict law called for some legal reason ('*causa civilis*') for enforcing the promise."

"*Causa*" in the civil law was the reason for enforcing the promise.

"Additional civil reasons developed beside form. There might be the delivery of a *res*, or there might be the doing of something. In a few cases mutual assent came to suffice. Thus ultimately in Roman law there was legal reason for enforcement if there was promise plus form, or promise plus delivery of a *res*, or if the promise came under one of the four categories of consensual contract. To these were added certain classes of actionable pacts, some equitable in origin, some statutory. The Roman law got no further."²⁴

2. *Bonds or Debts by Specialty.* Bonds are not mere promises to pay, but are a formal acknowledgment or admission of indebtedness under seal. The formal admission under seal is conclusive evidence of the obligation. Formal contracts are sometimes contrasted with consensual, but they are really obligatory by reason of consent declared in a certain form. It is a question of evidence of the intent to be bound. The contractual intent is the main thing.²⁵ Modern courts, however, are in danger of losing sight of the fact that sealed instruments do not at common law rest on *mutual* assent or consideration.²⁶

A *recognizance* is an acknowledgment in court by the recognizer that he is bound to a certain payment, subject, perhaps, to a condition subsequent. Personal bail bonds are often taken in this form. It is an undertaking of an obligation by a judicial record, entered into before some court or magistrate. It is in the nature of a contract, being voluntarily undertaken.²⁷

3. *Debts on Simple Contract.* A simple contract debt is an obligation to pay for an equivalent which has been received at an agreed price. The source of the obligation is not a promise to pay

24. On the point that the Roman law required, in addition to the promise, some definite ground for enforcing it, a so-called '*causa*,' see *Sohm*, "Institutes," sec. 12, pp. 143, 371. *Lee*, "Introduction to Roman-Dutch Law," p. 196; *Lee*, "Cause and Consideration," *Yale Law Journal*, XXV, p. 536; *Lorenson*, "Causa and Consideration in Contracts," *Yale Law Journal*, XXVIII, p. 621.

25. The source of obligations in bonds and covenants and the reason for the efficacy of a seal in deeds has never been better expounded than by Thomas Bromley in his picturesque argument in the old case of *Sharlington v. Strotten* (K. B., A. D. 1565). *Rood*, "Cases on Real Property," pp. 188, 195.

26. See *Sellers v. Riker*, 292 Ill. 468. See, also, by the writer, *University of Illinois Law Bulletin*, II, p. 351; *E. H. Decker*, *University of Illinois Law Bulletin*, I, pp. 82, 163, 164, 172.

27. *Williston*, "Contracts," Vol. I, sec. 220; *National Surety Co. v. Nasoro* (Mass., 1919), 123 N. E. 346.

but the voluntary receipt of value or *quid pro quo*. This may be compared to the "real contracts" of the Roman law. Debt is a unilateral obligation to complete an exchange already half executed. "An action of debt will not lie on a unilateral promise to pay money, unless the promisor has received an equivalent."²⁸

4. *Simple Contracts and the Varieties of Consideration.* The ground or source of obligation in simple contracts is not agreement alone but also consideration. An agreement to do or to pay anything on one side without any compensation on the other does not give rise to a claim. And why should the law enforce a gratuitous promise? The promisee has ordinarily no basis of claim thereon.²⁹

Dean Ames says there are two kinds of consideration, (1) detriment, and (2) precedent debt.³⁰ It is suggested, however, that there are several forms of consideration, which are essentially different grounds for the enforcement of a promise. Consideration is thus of various sorts, like malice aforethought, and cannot be reduced to one single comprehensive formula. It includes the following varieties: (1) the receipt of present value or in other words benefit to the promisor in return for his promise; (2) detriment actually incurred by the promisee, that is some present concession made by the promisee as a matter of bargain; (3) possibly a formal recital of nominal consideration showing an intention to be bound.³¹

(4) *Executory Consideration.* Consideration in bilateral, or *bi-promissory* contracts as they might well be called, presents a different problem from consideration in unilateral, half-executed, or *uni-promissory* contracts, in which consideration of the present benefit and detriment variety was first recognized. The theory of consideration in bilateral contracts is not yet settled or agreed upon.³² In bilateral contracts the source of obligation is not present detriment or value received, nor is it consent alone, but the reciprocity of bargain. Good faith demands that bargains in which

28. *Langdell*, "Summary of Contracts," sec. 46, 100. Debt lies for value received, not for damages for non-performance of a promise to pay such as that of a guarantor or an insurance company; *Potter v. Gronbeck*, 117 Ill. 404, 408; *Heffron v. Rochester Co.*, 220 Ill. 514, 517; *Cubbins v. Mississippi*, 241 U. S. 351; *Ames*, *Harv. Law Rev.*, VIII, p. 261; "Legal Essays," pp. 93, 94.

29. See *South Park v. Chicago*, 286 Ill. 504, 510.

30. "Lectures on Legal History," p. 124, *Harvard Law Review*, II, 1, 14; *Street*, "Foundations of Legal Liability," II, pp. 61, 143.

31. *E. H. Decker*, *University of Illinois Law Bulletin*, I, pp. 146, 172; *Ill. Cen. Ins. Co. v. Wolf*, 37 Ill. 354; *Schneider v. Turner*, 130 Ill. 28; see note A. & E. Annotated Cases, 1912B, 360, 363. See, however, *Williston*, "Contracts," I, sec. 115b, p. 244.

32. See *Street*, "Foundations of Legal Liability," II, pp. 57, 58, 67, 107, 110; *Ballantine*, "Doctrine of Consideration," *Mich. L. Rev.*, XI, p. 425; "Mutuality and Consideration," *Harv. L. Rev.* XXVIII, pp. 121, 128.

there is mutuality or reciprocity of undertaking be binding.³³ The consideration or ground of enforcement is to be found rather in the non-gratuitous character of the bargain, the mutuality of the undertakings, than in the mutuality of obligations as it is usually expressed. In many cases bi-promissory contracts are binding on one party although there is no mutuality of obligation.³⁴

(5) *Promissory Estoppel*. Injurious reliance or promissory estoppel is coming to be recognized as a ground of enforcement of gratuitous promises, as in case of charitable subscriptions. It is not true as Salmond supposes, that every valid contract is reducible to the form of a bargain, that if I do something for you, you will do something for me.³⁵ Even a promise to make a gift will become binding if reasonably acted on.³⁶

Indeed one of the main ideas at the origin of consideration in assumpsit is that of responsibility for inducing justifiable reliance on one's undertaking to another's detriment. Thus the law tends to enforce promises, not only when the promisor requested action as the return or price of his promise, but also where he should reasonably have expected a change of position. The courts enforce many promises for which there is no agreed equivalent.

(6) *An Existing Indebtedness*. A debt or contractual liability is a good ground for enforcing a promise to perform it. This was the source of the action of indebitatus assumpsit.³⁷ The mere existence of most obligations is of itself sufficient to raise and support a fictitious promise to perform them.³⁸ As Prof. Williston points out, however, there is now little need for this type of consideration.³⁹

(7) *An Existing Moral Obligation*. The moral claim arising from receipt of a material benefit by the promisor is a sufficient ground according to some courts, to make a promise to perform the duty of common honesty binding, even though it was not quite sufficient to raise a quasi contract.⁴⁰ In Illinois and perhaps a majority of states, however, the only moral obligation which will afford con-

33. *A. L. Corbin*, Yale Law Journal, XXVII, p. 376.

34. See writer, Harv. L. Rev., XXVIII, p. 121. *Williston*, "Contr.," I, secs. 103e, 105.

35. *Salmond*, "Jurisprudence" (2nd ed.), p. 318.

36. See *Williston*, "Contracts," I, p. 313.

37. *Ames*, Harv. L. Rev., II, 18, "Lectures on Legal History," 129, 130, 146.

38. *Board v. Bloomington*, 253 Ill. 164.

39. *Williston*, "Contracts," I, sec. 143.

40. See by the writer, Harv. L. Rev., XXVIII, 121, 123, note 3.

sideration for a promise is one which has been at some time a legal duty.⁴¹

The doctrine of consideration still seems too narrow to recognize all just grounds of enforcement, and as Lord Dunedin points out in *Dunlop Co. v. Selfridge Co.*⁴² the effect of the doctrine of consideration may be to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.⁴³ The tendency of development in our law, as in the Roman law, will be towards the enforcement of all promises for which there is just ground, troubling less about technical legal detriment or the niceties of consideration than the requirements of good faith and honesty.⁴⁴

5. *Express Trusts.* Maitland says in his "Lectures on Equity:"⁴⁵

"For my own part, I think that we ought to confess that we cannot define either agreement or contract without including the great majority of trusts, and the reasons why we still treat the law of trusts as something apart from the law of contract are reasons which can be given only by an historical statement."

There is indeed often no substantial distinction between a declaration of trust and a contract or promise to hold something for the benefit of another, except the form of expression.⁴⁶ Thus A by transferring property to B and declaring his intention that B shall hold or apply or manage it for the benefit of C, can, if B consents, create a trust obligation between B and C. By a similar declaration, without any transfer he can create a trust obligation between himself and C. How is this transaction to be distinguished from a mere promise which requires a consideration to support it? If A executes a writing and delivers it to B, "I hereby declare that I hold such and such property of my own in trust for B, to pay him the net income for life," this is a good declaration of trust and A comes under an obligation. But if A had written, "I hereby promise B to convey to him on request such and such property of mine, or to pay to him the income for one year," it would be a mere promise and no obligation would result. A consideration was formerly necessary to raise

41. *Schwerdt v. Schwerdt*, 235 Ill. 386, 390, Ill. L. Rev., III, 461; Williston, "Contracts," I, secs. 148, 150.

42. (1915) Appeal Cases, 847, 855.

43. See, also, *Wigmore*, Ill. L. Rev., III, 461.

44. *Page*, "Contracts," I (2nd ed.), sec. 656.

45. P. 53.

46. *Terry*, "Leading Principles of Anglo-American Law," sec. 492.

a use, but is not now necessary to create a trust.⁴⁷ The law thus recognizes a distinction between the legal effect of making a promise generally and the act of assuming a trust obligation; but there is no substantial difference between them; it is simply an historical distinction without a difference. It is inconsistent with the doctrine that a covenant without consideration will not be specifically enforced in equity,⁴⁸ and also with the rule that a gift of personal property requires delivery. The right of a cestui que trust is primarily the benefit of an obligation, but owing to the remedy of specific performance it gives him an equitable interest in the res. According to some writers, the creation of a trust is to be regarded rather as the grant of a beneficial interest than as the creation of an obligation.⁴⁹ It is believed that this view is neither historically nor theoretically sound. Equity acts in personam by the imposition of obligations and the rights in rem of the cestui are through specific enforcement of rights in personam affecting the trustee and others whose conscience is charged.

B. PRESCRIBED OBLIGATIONS

In contrast with consensual obligations we come now to consider those which are constructive, i.e., defined and prescribed without reference to the will or assent or declaration of the obligor. Agreement and promise are not the only sources of obligation. There is a great variety of prescribed obligations, many of them of a remedial character, some legal and some equitable. It will be possible only to refer to the sources of some of the leading varieties.

1. *Quasi Contracts*. It has been customary to include under quasi contracts all non-contractual legal obligations which are enforced by contractual forms of action. It seems preferable, however, as Woodward suggests,⁵⁰ to confine this class of obligations to those arising from the receipt of a benefit, the retention of which is unjust, or the imposition of an unjustified burden. Judgments, customary and statutory obligations are better treated as different species, since they arise from transactions and sources of a diverse nature. Quasi contracts will then become a homogeneous class

47. Pound, "Consideration in Equity," *ILL. L. REV.*, XIII (April, 1919), pp. 667, 670; *Harv. L. Rev.*, XXV, p. 671.

48. See *Crandell v. Willig*, 166 Ill. 233; *Corbett v. Cronkhite*, 239 Ill. 15.

49. See Scott, "Nature of the Rights of the Cestui Que Trust," *Col. L. Rev.*, XVII, pp. 269, 270; Salmond, "Jurisprudence" (2nd ed.), pp. 230, 233.

50. "Quasi Contracts," sec. 1.

instead of being a general receptacle for all non-contractual obligations.⁵¹

In *People v. Dummer*⁵² Justice Cartwright in holding that a suit in debt for taxes is not an action on a contract express or implied under section 2a of the Municipal Court Act, clearly points out the difference between contracts *implied in fact* and *quasi contracts*, which are constructive contracts created by implication of law. "They are not contract obligations in the true sense because there is no agreement of the parties. . . . The idea of contract is purely fictitious."

The source of obligation is commonly the receipt of a benefit at another's expense under circumstances in which compensation is justly due. The law compels the defendant to disgorge his unjust gain.⁵³ It is sometimes said that quasi contracts arise from unjust enrichment at the expense of the plaintiff, but it seems better to say that the obligation arises from the receipt of a benefit, because in some cases there may be no actual enrichment. It is the receipt of the benefit and not the use or enjoyment of it which is essential to quasi contractual obligation. The loss of the benefit after it has been received, as by fire or robbery, is no defense.⁵⁴

Professor G. P. Costigan has recently pointed out in an article entitled "Implied-in-Fact Contracts"⁵⁵ that there is a class of "no-meeting-of-the-mind-implied-in-fact contracts." In these cases a debt arises from the receipt of a quid pro quo to pay the reasonable value of what is done by the plaintiff at the defendant's request, rather than merely the enrichment or benefit received by the defendant, although the express contract intended did not come into existence.⁵⁶ A contractual measure of damages is allowed in these cases rather than a quasi contractual, because on the whole the obligation is more consensual than non-consensual.

It will not be possible here to attempt a subdivision of quasi contracts, which arise from a variety of transactions, such as the receipt of money or benefits under mistake of fact, or under a contract which is invalid or which becomes non-enforcible; also benefits procured by fraud or undue influence or wrongful appropriation;

51. See, also, *Street*, "Foundations of Legal Liability," II, p. 206.

52. 274 Ill. 637.

53. See, also, *Highway Commissioners v. Bloomington*, 253 Ill. 164, 171, 26 Ann. Cas. 471.

54. *Woodward*, "Quasi Contracts," sec. 76; Cf. note, "What Constitutes Receipt of Benefit in Quasi Contract?" Col. L. Rev., XX, p. 602. *Fay v. Slaughter* (1901), 194 Ill. 167, 168, 62 N. E. 592.

55. Harv. L. Rev., XXXIII, p. 376.

56. See *Vickery v. Ritchie*, 202 Mass. 247.

and also, but rarely, services rendered in great emergency. The law rather strictly enforces the principle that a man is to be made a debtor only by his consent and not by officious intermeddling. Where one wrongfully takes the goods of another and applies them to his own use the owner may "waive the tort" and sue in assumpsit on the common counts for the value received without proof of conversion into money.⁵⁷ It is in truth not a case of "waiving a tort," but of electing an alternative remedy upon an obligation based on enrichment of the defendant by the receipt of an unjustified benefit.⁵⁸

Obligations arising quasi ex contractu are closely related to tort liability. They are obligations to make reparation or restitution. Many quasi contracts might no doubt have been regarded as torts, or as obligations quasi ex delicto, rather than quasi ex contractu.⁵⁹ Thus if A, under mistake of fact, pays money to B, which he does not owe him, B might be regarded as guilty of a wrong or tort in withholding money which does not honestly belong to him. Quasi contracts may, however, be regarded as obligations in the nature of debt from the fact that they usually arise from the receipt of value and are a duty to pay the value of what has been received.

Quasi contracts are not as universally based on unjust enrichment, or receipt of material benefit or value, as is usually assumed. Unjustifiable prejudice or burden, as well as unjustified benefit, would seem to be a source of quasi contractual claims. Quasi contracts may be looked at from the point of view of the plaintiff as obligations to rectify an unjust appropriation of property or labor, or an unjust impoverishment or deprivation of the plaintiff, as well as that of unjust retention or enrichment of the defendant. Thus, where plaintiff has a right to rescind a contract because of defendant's wrong, fraud, or breach, the defendant may be under a quasi contractual duty to restore the plaintiff to his former status and not merely to surrender the benefit which the defendant has received. The amount of defendant's enrichment may not always be identical with the amount necessary to restore plaintiff to his former condition.⁶⁰

57. *City of Elgin v. Joslyn*, 136 Ill. 525, 532.

58. See Yale L. Jour., XXVIII, pp. 255, 835.

59. *Jenks*, "Digest of English Civil Law," p. 315, note.

60. *Williston*, "Contracts," I, sec. 3, sec. 1478. *Costigan*, Harv. L. Rev., XXIII, sec. 95, n. 30. *Newhall Engr. Co. v. Daly*, 116 Wis. 256, 263, 93 N. W. 12 (1903); *Mooney v. York Iron Co.*, 82 Mich. 263, 265, 46 N. W. 376; *Kempton v. Floribel Land Co.*, 189 Pac. 478 (Cal. App.), *Welch v. Lawson*, 32 Miss. 170.

If one is compelled to pay a debt which another in justice ought to have paid, he is entitled to be relieved of this burden.⁶¹ Such is the nature of general average, which is an obligation arising from the sacrifice of part of the cargo to save the ship or passengers from extreme peril. The burden is to be shared by contribution of all concerned.⁶²

2. *Resulting and Constructive Trusts.* Constructive trusts may be described as "remedial obligations to compel specific restitution of a received benefit in order to prevent unjust enrichment."⁶³ They are closely related to quasi contracts and are raised by equity in cases where property has been obtained by fraud, mistake, or abuse of confidence, or under circumstances in which honesty and the policy of the law require that it be restored to the true proprietor. Such is the source of the equity of redemption of the mortgagor, where equity creates the obligation in the teeth of the express agreement of the parties that the land shall be forfeited, on the ground that the mortgagee is entitled in justice only to repayment of the mortgage debt with interest, and that a forfeiture is a dishonest acquisition which he ought not to hold.⁶⁴

It has been suggested that "resulting trusts" should, if possible, be confined to those which may be described as *implied in fact* in contrast to constructive trusts, which are fraud-rectifying and *implied in law*. At the present time some so-called resulting trusts are really constructive as where the intended trust fails.⁶⁵ Where A pays the purchase money to X and has the conveyance made to B, who agrees orally to hold in trust for A, or to convey to him, it may be said that a resulting trust arises in spite of the Statute of Frauds from the intention which is presumed from the facts. In the case of a wife or child of the payer, there is a presumption that a gift or advancement is intended. A resulting trust is then, sometimes at least, a "presumed intention trust," implied in fact and based on a rebuttable presumption from circumstances.⁶⁶ Resulting trusts ordinarily arise in accordance with actual intent. But the intent is inferred or assumed from the accompanying facts or circumstances

61. *Harvey v. Drew*, 82 Ill. 606; *Farwell v. Becker*, 129 Ill. 261.

62. *Columbian Ins. Co. v. Ashby*, 13 Peters (U. S.) 331.

63. Dean Pound, "Progress of the Law: Equity," Harv. L. Rev., XXXIII, 420, 421.

64. Langdell, "Survey of Equity Jurisdiction," p. 14.

65. See G. P. Costigan, Jr., "Classification of Trusts," Harv. L. Rev., XXVII, 437, 462; "Constructive Trusts," Harv. L. Rev., XXVIII, 237, 366; 39 Cyc., 27; Stone, "Resulting Trusts," Col. L. Rev., VI, 326; Costigan, "Constructive Trusts," Mich. L. Rev., XII, 435, 515; Ill. L. Rev., VIII, 68, 73.

66. *Cook v. Patrick*, 135 Ill. 499; *McCarthy v. McCarthy*, 289 Ill. 365; *Roche v. Roche*, 286 Ill. 336, 350.

that the beneficial interest is not to go with the legal title. In the language of the Illinois Supreme Court, however, a resulting trust is often spoken of as not arising out of the contract of the parties, but by mere operation and implication of law like a constructive trust.⁶⁷

An interesting question is presented in cases where the heir murders the ancestor, or the devisee murders the testator, or the beneficiary murders the insured. Will the law allow the murderer to retain or acquire the fruits of his crime? Can a constructive trust be raised in favor of beneficiaries who were not deprived of anything, at whose expense the murderer was not enriched? Must you find an enrichment at some one's expense, who is to be beneficiary of the trust? Dean Pound says it is simply a question of exclusion by a remedial device.⁶⁸

In *Wall v. Pfanschmidt*,⁶⁹ the Illinois Supreme Court held that there was no room to raise a constructive trust in a case where the heir had caused the death of the ancestor; and the fact that the heir caused the death does not deprive him of his inheritance or limit his title to a naked trust for the benefit of other heirs. This went on the ground that the laws of descent depend entirely on the provisions of statute. It has been pointed out, however, that the court fails to face the trust question, as a constructive trust does not violate the statute of descent but only prevents unjust enrichment.⁷⁰ The murder of the insured person by the beneficiary precludes a recovery of the insurance by the beneficiary, but the heirs of the insured are entitled. The life insurance case is probably to be explained on a constructive trust theory.⁷¹

The equitable obligations of contribution, exoneration, indemnity and subrogation are created by equity to relieve one party from the burdens of another which have inequitably been cast upon him and for which that other is primarily liable. By the creation of these quasi contractual obligations the liability is apportioned and shifted to the shoulders which should carry their fair share of the burden.⁷²

67. *Monson v. Hutchin*, 194 Ill. 431. *Hinshaw v. Russell*, 280 Ill. 235, 239.

68. "Equity," Harv. L. Rev., XXXIII, pp. 422, 423.

69. 265 Ill. 180, 192.

70. See Ill. L. Rev., IX, 505, Calif. L. Rev., I, 397, 513; Pound, "Equity," Harv. L. Rev., XXXIII, 422; Law Quarterly Rev., XXX, p. 211; Missouri Law Bull., XVIII (March, 1920).

71. See *Supreme Lodge v. Menkhause*, 209 Ill. 277; *Holdom v. Ancient Order*, 159 Ill. 619. Notes, Virginia L. Rev., VI, 377, 379; U. of Penn. L. Rev., LXVIII, 452.

72. Langdell, "Equity Jurisdiction," p. 15.

3. *Warranty.* Warranty in sales is an obligation of indemnity owed by the seller to the buyer against loss by reason of defects in quality, title, or description of the goods. This obligation arises in many instances from the express or implied terms of the contract of sale, but it frequently arises from representations of fact inducing the contract. Professor Williston has described the nature of the obligation imposed by warranty when based on representations of fact as either one in quasi-contract or quasi-tort. The remedies appropriate to contract and also to tort are applicable. The best modern authorities disregard the seller's intent to warrant or enter into a contract.⁷³ Knowledge of the falsity of the representation is essential to make one liable for the wrong of deceit but not for breach of warranty.

"Implied warranties" in sales often arise from the express terms of the contract, such as the warranty that the goods will correspond to the description of them in the contract of sale. It may be difficult to determine whether the implied warranty of title and the implied warranty of merchantable quality and fitness arise from express or implied terms of the contract, or from express or tacit representations of the seller. It is sufficient here to point out that some warranties are primarily contractual, being obligations to indemnify for breaches of contract, and some imposed from representations inducing the contract.

Professor Williston suggests that obligations of warranty imposed by law irrespective of promise or assent, which are enforceable in special assumpsit, should be recognized as a variety of quasi contracts. It would seem more convenient, however, to classify them as a separate species of prescribed obligation. There is no convenience in widening the class of quasi contracts, already too general, to include all prescribed obligations, which happen to be enforced by contract actions, regardless of the nature or source from which they arise or the measure of damages therein.⁷⁴

There is an implied warranty of authority where an agent in good faith assumes an authority which he does not possess, and induces another to deal with him in the belief that he has such authority.⁷⁵ Responsibility for influencing another's conduct and leading him to change his position is one of the principles underlying the doctrine of consideration.

73. *Williston*, "Sales," sec. 197, 234; "Liability for Honest Misrepresentation," *Harv. L. Rev.*, XXIV, p. 415; *Harv. L. Rev.*, XXI, 555.

74. See *Williston*, "Contracts," Vol. I, p. 4. *Street*, "Foundations of Legal Liability," Vol. I, pp. 385, 389, 404.

75. *Collen v. Wright* (1857), 8 El. & Bl. 647.

4. *Estoppel in pais* is not a mere rule of evidence, but is an obligation which precludes a party from taking advantage of his own misrepresentation. This obligation was first recognized in equity but has obtained general recognition in the common law courts. In Illinois, however, equitable estoppel can not be pleaded in an action of ejectment. The obligation is closely connected with deceit and is a kind of supplement to that branch of the law, the general requisites being the same. The obligation is negative, preventing the person making the misrepresentation from taking an inconsistent position or asserting rights of action or defenses which would result in the infliction of damage. Estoppel is thus a negative obligation not to go back on a representation, usually specifically enforced, whereas warranty in some instances is a positive obligation to indemnify for damages resulting from misrepresentations.⁷⁶ Justice Cartwright in *Sutter v. People* (284 Ill. 634), states the principles of estoppel to be that where one has fraudulently caused another to believe in the existence of a certain state of facts and induced him to act upon that belief, he is precluded from taking advantage of the error, or changing his position so as to produce a fraudulent result.⁷⁷

This obligation may well be held also to arise from honest but negligent misrepresentations.⁷⁸

5. *Gratuitous Undertakings.* In some cases a gratuitous agent or volunteer is liable for negligence or failure to exercise diligence and the degree of skill which he assumes to have.⁷⁹ In a recent English case⁸⁰ the defendants, newspaper publishers, advertised that they would answer inquiries from readers who wished financial advice. The plaintiff, a reader, thereupon wrote requesting the name of a good stock broker. The defendant negligently, but honestly, gave the name of one who was not a member of the stock exchange, and who was an undischarged bankrupt. In consequence of the advice plaintiff employed the broker and lost his money. It was held that the defendants had contracted to use reasonable care in answering inquiries. Professor Williston criticises the case on the ground that "it is impossible to find the elements of a con-

76. See *Street*, "Foundations of Legal Liability," I, p. 374, 407; *Street*, id., II, p. 247; *Bigelow*, "Estoppel," (5 W.) p. 456, 556.

77. See *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, 1025, 1026.

78. *Street*, "Foundations of Legal Liability," I, p. 400, 407; *Williston*, "Honest Misrepresentation," XXIV Harv. L. Rev., 415; *J. Smith*, Harv. L. Rev., XIV, p. 184; *Pollock*, "Torts" (10th ed.), p. 302.

79. *Williston*, "Contracts," I, p. 328; *Page*, "Contracts" (2nd ed.), secs. 538, 539.

80. *De la Bere v. Pearson* (1907), 1 K. B. 483, affirmed in (1908), 1 K. B. 280.

tract."⁸¹ It would seem, however, to be a case of obligation arising from a gratuitous undertaking rather than a case of tort liability for negligent but honest misrepresentation.⁸²

6. *Bailment Obligations.* Where the bailee is guilty of a culpable loss or injury of the goods in his care, the authorities generally hold that the bailor may bring an action either on the theory of tort or for breach of contract at his option.⁸³ Even in the case of gratuitous bailments, it is said that the modern theory of the bailee's liability is that of contract, and that the bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely.⁸⁴ Since, however, the custody of the goods is a burden to the bailee and an advantage to the bailor, it would seem fictitious to speak of the delivery of possession as in reality a consideration. Some courts hold that the gratuitous bailee is liable only in tort and not in contract.⁸⁵ The true theory as to the source of the bailee's obligation to care for things intrusted to him would seem to be that of another obligation prescribed by law from the relation as holder for another, rather than either as tort or contract as usually explained.

It is said in the case of a gratuitous bailment, that "the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management." This means that the voluntary taking charge of the goods is a sufficient basis upon which to impose an obligation of care.⁸⁶ The acceptance of A's goods by the bailee involves the assumption of an affirmative obligation to use care and diligence, which arises even without consideration, as where one takes charge of the goods of another as by finding, and enters into a relation where the owner must necessarily depend on the bailee to look out for his property. Oftentimes this obligation will partake of the nature of contract, as in borrowing an article the borrower impliedly agrees to return it; and the failure to perform this undertaking constitutes an actual breach of contract.⁸⁷ There need, however, be no contract as in a case of a bailment by finding, but obliga-

81. *Williston*, "Contracts," I, sec. 32a, p. 47.

82. See, also, *Harv. L. Rev.*, XXVI, p. 429; *Can. L. Rev.*, II, p. 658; *Gates v. Chesapeake & Ohio* (Ky.), S. W. 564, 5 *Am. Law Rep.* 507; *Mad-dock v. Riggs*, 190 Pac. 12 (Kans.).

83. *National Bank v. Graham*, 100 U. S. 699.

84. *Pollock*, "Contracts" (3rd ed.), p. 194.

85. *Flint & P. M. R. Co. v. Weir* (1877), 37 Mich. 11; 26 *Am. Rep.* 499.

86. *Coggs v. Bernard* (1703), 2 Lord Raymond 909; *Smith*, "Leading Cases" (12th ed.), I, 191.

87. *Tindall v. McCarthy*, 44 S. C. 487, 22 S. E. 734; *Chapman v. State*, 104 Cal. 690; 38 *Pac.* 457.

tions will result from the finder's gratuitous undertaking to hold the property for the benefit of the owner.⁸⁸

7. *Obligation to Account.* Where one has received property belonging to another to invest or use on his behalf, the obligation arises by operation of law to account for its proceeds to the true owner. The obligation to account has been described as a common law trust. Agents charged with handling for profit money or goods, or another's lands, such as factors, bailiffs, partners, commission merchants, executors, trustees and guardians, come under an obligation, which is often now declared by statute, to render an account of the capital and proceeds which they hold on behalf of their principal.

If A delivers to B money to pay C, C has an action of account against B and not of debt, because there is no contract. Account has given away, however, to indebitatus assumpsit for money had and received to the use of the beneficiary.⁸⁹ It is held that equity has no jurisdiction in case of a bailment to a factor to sell, upon his refusal to pay over the proceeds, as the action at law for money had and received is an adequate remedy.⁹⁰ A joint tenant or tenant in common of land who has received more than his just share of rents and profits is liable to account to his co-tenant but is not liable in assumpsit.⁹¹

8. *Covenants Running with the Land.* (1) Why the burden of covenants run. The benefit and burden of covenants which "touch and concern" land are sometimes treated as annexed to estates or interests in the land, both freehold and leasehold, and run with them for and against successors in estate. Without going into the technicalities and refinements of this complicated subject, it may be suggested that in the case of burdens, there is a constructive assumption of the obligation, and that the assignee takes the burden as a kind of quasi contractual liability imposed as a condition of accepting the benefits of the estate. By accepting title or possession he constructively assumes and makes himself liable for all covenants concerning the land, but not for collateral or personal covenants. The burden thus is not transferred, but is incurred or assumed by taking the property.

88. Beale, "Gratuitous Undertakings," Harv. L. Rev., V, p. 222. Note, Harv. L. Rev., XXVII, pp. 167, 168.

89. Ames, "Lectures on Legal History," p. 116-121; Langdell, "Brief Survey of Equity Jurisdiction," 85-89; Scott, "Cases on Trusts," 569, 571; Hening, in "Select Essays in Anglo-American Law," III, p. 344.

90. Taylor v. Turner, 87 Ill. 296, 302.

91. Ill. Rev. Stat., chapter 2, section 1; Cheney v. Ricks, 187 Ill. 170; Wolkau v. Wolkau, 202 Ill. App. 390; Kemp v. Merrill, 92 Ill. App. 46.

(2) Why Benefits of Covenants Run. The right of action on a covenant of title, for example, devolves along with the land itself to each successive owner, although he is not a party to the deed or lease containing the covenant. It is suggested that here also the true basis is not assignment, but a right given to a third party beneficiary. If the covenant was intended to be beneficial to the owner of the land as owner, the holder of the title is contemplated as the beneficiary and the real party in interest. The successors in title take as beneficiaries rather than assignees of a contract. The obligation is enforceable in the name of the person who is owner at the time of damage suffered and not in the name of the covenantee.

It is believed that the policy of the law in connection with the running of benefits and burdens of covenants is the same both at equity and at law. Dean Ames advanced the theory that the enforcement of restrictive covenants in equity against successors is based on a quasi contractual obligation imposed from the circumstances of taking a res with notice, actual or constructive, of a burden in regard to it, assumed by the owner.⁹² This idea seems to be followed by the Illinois Supreme Court in *Wiegman v. Kusel*.⁹³ It is said:

"Each purchaser buying a lot with notice of the general plan impliedly assents thereto and can be compelled (in equity) to comply therewith at the suit of the owner of any other lot."

Some writers, however, criticize this theory and contend that restrictive covenants are to be regarded as equitable easements or servitudes attached to the land, rather than as constructive obligations imposed to prevent unjust enrichment.⁹⁴ According to Dean Ames, the right of third persons to the benefit of restrictive agreements is a case of a contract for the benefit of a third party. The right of successors in title depends on whether the covenant was intended for the personal benefit of the covenantee or for the protection of the holders of land generally.⁹⁵ Other writers contend that equity regards the owner to be benefited as having an equitable interest through the covenant in the property like an easement, a property right rather than one arising from an obligation, which follows the land into the hands of any one but an innocent purchaser.⁹⁶

92. Ames, "Lectures on Legal History," p. 382.

93. 270 Ill. 520, 110 N. E. 884.

94. See Pound, "Equity," Harv. L. Rev., XXXIII, p. 813; Stone, "Equitable Rights and Liabilities of Strangers to Contracts," Col. L. Rev., XVIII, pp. 291, 295; Scott, Col. L. Rev., XVII, p. 281.

95. Ames, "Lectures on Legal History," p. 390.

96. See Pomeroy, "Equity Jurisprudence" (4th ed.), secs. 1693, 1696.

9. *Obligations of Public Callings.* In *Chudnovski v. Eckles*,⁹⁷ it was held that the obligation of a common carrier to carry a passenger safely is an "implied contract," so as to bring the suit by the passenger for personal injuries within the jurisdiction of the Municipal Court of Chicago. The common law has long regulated certain public callings by imposing obligations upon those engaged in these pursuits, particularly upon common carriers and innkeepers, toward all those who desire to employ them. The source of liability is the relation of dependence arising from the character of the business rather than contract or agreement. The obligations incident to public callings upon which the public depends for transportation and accommodations while traveling are often said to be implied contracts, but are in truth positive duties imposed upon legislative considerations of public policy and welfare.⁹⁸ The enjoyment of franchises, such as the use of the streets for wires and mains, is a recognized ground of public service obligations everywhere.

The distinction should be kept in mind between the imposition of such obligations by the common law and the constitutional question of power to include new callings in the category of public callings by statute. What branches of business or industry may be included in the category of public service companies for purposes of regulation is a question with which we have here no concern. The basis or source of public service duties at common law is in dispute.⁹⁹ In *Inter-Ocean Pub. Co. v. Associated Press*,¹⁰⁰ in a suit for injunction against the Associated Press to restrain it from cutting off news service which the plaintiff paper received, it was held that the business of gathering news was one charged with a public interest and that it must submit to be controlled for the common good as a matter of common law; and all newspaper publishers desiring to purchase such news were entitled to service without discrimination against them. In a Missouri case, however, it was denied that there was any basis to impose upon the Associated Press the obligations of a public calling as a matter of common law, as it enjoyed no franchise or peculiar privilege to serve as a basis for such obligations.¹⁰¹

97. 232 Ill. 312, ILL. L. REV., II, p. 46.

98. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

99. See on this subject, *Burdick*, Col. L. Rev., XI, p. 515, 516, 743; *People ex rel. Gaskill v. Cemetery Co.*, 258 Ill. 36, 101 N. E. 219; Note, Harv. L. Rev., XXVI, 761; *Ladd v. Southern Cotton Press Co.* (1880), 53 Texas 172; *American Live Stock Com. Co. v. Chicago L. S. Exch.*, 143 Ill. 210, 238; *Stock Exchange v. Board of Trade*, 127 Ill. 153.

100. 184 Ill. 438, (1900).

101. *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151.

10. *Suggested Humanitarian Obligations.* It has been suggested that the law should recognize a humanitarian obligation to rescue or render aid in case of emergency to a fellow man in danger or distress. Dean Ames suggested as a possible working rule that—

“one who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.”¹⁰²

It is not likely that the law will consider it practicable to attempt to enforce such an obligation. In the case supposed the only relation between the parties is that both are human beings and one is in dire need. Dean Ames recognizes that the case would be much stronger where the situation of need or imminent danger was created by the act, although innocent, of the person who refuses to prevent death. The question arises concretely, for example, where a person is struck by an automobile or where a trespasser is run over and injured without negligence by a railroad train. Does the company owe the injured trespasser a legal duty of care and attention in the emergency? Some courts would seem to recognize such an obligation. Other courts would recognize one only where the company by its servants assumes charge of the trespasser or injured person who is in a helpless condition; others are hardly willing to go even thus far.¹⁰³ An obligation to care for an injured person may well be regarded as growing out of such relations as carrier and passenger or employer and employee, not because the company assumed the burden, but because the relation creates a duty to act.¹⁰⁴

11. *Fiduciary Obligations.* There are fiduciary obligations of good faith and loyalty imposed by the protecting arm of the law on persons standing in a position of trust and confidence. The obligations arise from the relationship of dependence of the one and the opportunity to overreach and take undue advantage of a defendant by the other. These forbid them from making any profit at the expense of the party whose interests they are bound to pro-

102. Ames, “Law and Morals,” “Lectures on Legal History,” p. 451.

103. See F. H. Bohlen, “Moral Duty to Aid Others as a Basis of Tort Liability,” U. of Penn. L. Rev., LVI, pp. 217, 316; S. B. Warner, “Duty of a Railroad Company to Care for a Person It Has without Fault Rendered Helpless,” Calif. L. Rev., VII, p. 312 (July, 1919); *Whitesides v. Southern Railway Company* (1901), 128 N. C. 229, 38 S. E. 178; *Gates v. C. & O. R. Co.* (Ky.), 213 S. W. 564; 5 Am. Law Rep. 507.

104. See, also, Holmes, “Common Law,” p. 278. Pound, “End of the Law,” Harv. L. Rev., XXX, p. 214; Pollock, “Torts” (8th ed.), chap. XI.

test, or even from putting themselves in temptation's way by engaging in transactions where their interest would conflict with their duty. Such fiduciaries include among others, guardians, trustees, executors, promoters, directors of corporations, attorneys-at-law and agents generally.¹⁰⁵

12. *Obligations of Private and Public Office.* One who accepts an office in a corporation or business organization, or a public office, and undertakes to administer its duties, comes under an obligation which the law imposes to perform the duties of his office with integrity, diligence and skill.

13. *Domestic* or family relations give rise to natural obligations such as reciprocal duties of husband and wife, of parent and child, which are prescribed by law on the basis of the relation and in no sense dependent on the agreement of the parties.¹⁰⁶

14. *Judgments.* If A brings an action for damages against B and the court pronounces in his favor, the pre-existing liability becomes merged in the new legal relation, a judgment. A money judgment creates a debt, but according to the better view a judgment is not of a contractual nature, at least unless based on a contract.¹⁰⁷ Thus the liability of a corporation for infringement of a patent is not a debt within the meaning of statutes making stockholders and directors liable for such debts, although reduced to judgment.¹⁰⁸

15. *Statutory Obligations.* Many obligations of a private and also of a public nature are declared by statute, such as the obligation imposed upon finders to inform the owner or to advertise lost property. The stockholders' statutory liability for the debts of a corporation is usually said to be contractual, though in its nature it can hardly be classed either as contractual or quasi contractual.¹⁰⁹ There is no necessity at the present day for calling such liabilities as that of the owner to the sub-contractor under the mechanics' lien law an "implied contract," except perhaps as a matter of statutory interpretation or legal history.¹¹⁰

105. See *Ames*, "Lectures on Legal History," p. 466; *Wisniewsky v. Affeld*, 283 Ill. 557.

106. *Niboyet v. Niboyet*, L. R., 4 P. D. 1, 11.

107. *Belford v. Woodward*, 158 Ill. 135; *Rae v. Hulbert*, 17 Ill. 572, 579; *Williams v. Waldo*, 4 Ill. 264; *Street*, "Foundations of Legal Liability," II, p. 206; Col. L. Rev., XII, p. 272.

108. *Avery v. McClure* (Miss.), 47 So. 901, 22 L. R. A. (N. S.) 256.

109. See *Crippen v. Leighton*, 69 N. H. 540; 44 Atl. 538, 542; *Christopher v. Norvell*, 201 U. S. 216, 5 Ann. Cas. 740, Col. L. Rev., V, p. 606; *W. N. Hohfeld*, "Stockholders' Liability," Col. L. Rev., IX, pp. 285, 309. *Page*, "Contracts," I, sec. 66, n. 5.

110. See *Harty Bros. v. Polakow*, 237 Ill. 559.

When accessory statutory duties and liabilities are imposed upon persons who enter into contractual relations, as by workman's compensation acts, these are usually regarded as contractual in their nature, especially where coming under the act is voluntary.¹¹¹

The duty to pay taxes is a statutory obligation and not a contract implied in law. In the case of *People v. Dummer*,¹¹² an action of debt was brought on a claim for taxes in the Municipal Court of Chicago. The act creating the Municipal Court gives jurisdiction, among others, of "all actions on contracts, express or implied," when the amount claimed exceeds one thousand dollars. The court held that the duty to pay taxes is not a contract, that taxes are not debts and do not rest upon contract, express or implied. The fact that the statute may authorize suit in debt does not determine that the obligation arises out of express or implied contract. Therefore the Municipal Court had no jurisdiction. The case is a notable one in that the court refuses to classify a legal liability simply by the form of action, or to hold that whatever is not ex delicto must necessarily be ex contractu.¹¹³

111. Page, "Contracts," Vol. 1, sec. 66; *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85; *Gooding v. Ott*, 77 West Virginia 487, L. R. A. 1916D, 637.

112. 274 Ill. 637, 643, 646.

113. Cf. *Charles E. Carpenter*, "Nature of Obligation to Pay Taxes," *University of Illinois Law Bulletin*, I, p. 106.

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COMMENT ON RECENT CASES

EVIDENCE—HEARSAY EXCEPTION FOR STATEMENTS OF FAMILY HISTORY—QUALIFYING THE DECLARANT.—In the hearsay exception for statements about family history, *Blackburn v. Crawford*, 3 Wall. 187 (1865), long ago started a heresy; and the Supreme Court of Illinois does not shake off the shackles of that heresy. It arises in an application of the principle that the declaration must relate to a member of the declarant's family. E. g., if Doe's son says that Roe was a brother of Doe, the subject of the declaration is Doe's family; hence all that is needed to qualify the declarant is to show that he is Doe's son. But it is not necessary also to show

that he is related to Roe, because the declaration is about Doe's family. It is therefore immaterial whether the valuable estate that is in issue is the estate of Doe or of Roe.

But in *Blackburn v. Crawford*s the singular logic adopted was that the declaration's admissibility (made, say, in 1900) turns on the subsequent turn of events as to Doe or Roe being the one that died rich. If Doe died rich in 1920, and Roe's relatives claim, then Doe's son's declaration is admitted. But if Roe is the one who died rich, and Doe's relatives claim, then the declaration is not admissible.

This is, of course, illogical. But it is easy to see how the illogic might find a lodgment.

It did find a lodgment in *Jarchow v. Grosse*, 257 Ill. 36, 100 N. E. 290 (1912), where the limitation is laid down that "where the claimant is seeking to reach the estate of the declarant himself, . . . such declarations are admissible," otherwise not. And now, in *Nolan v. Barnes*, 294 Ill. 25, 128 N. E. 293 (1920), the same distinction is perpetuated; here the estate of Annie N. was in controversy, and N.'s declarations that A, B, and C were her relatives were admitted, because here the declarant's own estate was the one for which the heirship was to be traced. If, however, the same Annie N. had died poor in 1918, and her same relative, A, had died rich in 1918, and the latter estate was to be distributed, her very same declarations made in 1900-1910 would have been inadmissible.

The distinction has nothing to do with the relative trustworthiness of the declarations. It is due merely to faulty logic.

J. H. W.

PROPERTY—ESTATES—CONTINGENT REMAINDERS—MERGER. — In the case of *Cole v. Cole*, 292 Ill. 154, 126 N. E. 752, the testator devised his property to his widow for life and directed that at her death his executors should divide his estate into five equal parts and deliver one part each to his five children, naming them, each for the life of the particular recipient. The will then specifically dealt with the remainders after these life estates; in the case of one child, Lydia, the will provided that one-half thereof should go to a son of that child absolutely and the other half be divided among the other four children equally; in the case of two others, Julia and Sherman, the remainder was to be divided among their children, but if they have no children or grandchildren then living, to go over; and in the case of the two remaining children, Albert and Charles, the remainder was to go to their children absolutely. This will was subsequently changed by a codicil so as to give Albert and Charles the fee in their portions outright.

In that situation a bill was filed by Julia, Lydia, and Sherman to set aside the will, and following that an agreement was entered into by the five children of the testator and by the son of Lydia for a distribution and division of the testator's estate different from that provided by the will. The litigation represented by the prin-

cial case arose when Lydia, Julia, and Charles brought a bill to compel performance of this contract, but Charles, later, having aligned himself with the defendants, was made defendant, and so appeared in the litigation when it confronted the upper court.

The decision sustains the right to make such an agreement and upholds the jurisdiction of equity to enforce it, but the interesting situation in it is the disposition of the contingent remainder interests by this agreement thus entered into by three life tenants in a part, two owners in fee in a part, and one vested remainderman in a part, of whom the three life tenants were also vested remaindermen in a one-tenth interest, and they together with the two owners in fee ultimate reversioners as to all.

It is apparent that of the five shares thus apportioned among the five children, two were given in fee and three were given in the form of life estates; and of those three, one portion was finally disposed of by dividing the remainder interest therein, one-half to the four children other than the particular life tenant thereof, and the other half to the child of that particular life tenant. As to the other two portions of the three, the remainders were contingent and thus subject to destruction by merger of the particular estate and the ultimate reversion. (*Stoller v. Doyle*, 257 Ill. 374; *Smith v. Chester*, 272 Ill. 446.)

Upon this question of merger it has been held that the co-existence of the life estate and the ultimate reversion does not operate to extinguish the contingent remainder where the ultimate reversion descends to the life tenant directly as heir-at-law, and he stands invested therewith simultaneously with his identification as life tenant (*Gray v. Shinn*, 293 Ill. 580, 581). But such a person may accomplish the destruction by conveying his interest, life estate and ultimate reversion, to a third person (*Gray v. Shinn*, 293 Ill. 579), and the fact of this destruction is not altered by a subsequent reconveyance to the life tenant, who thereupon would take the fee free of the contingent remainders (*Messer v. Baldwin*, 262 Ill. 50).

In the principal case, the agreement entered into in effect worked a merger in such of the children as life tenants as did not have the fee by force of the will and codicil, of the life estate and the ultimate reversion in the particular portion set off to each. Whether such merger operated as a destruction of the contingent remainders in the case of the two children after whose life estates such was limited, it would seem, must depend upon whether the arrangement comes within the situation adverted to in the case of *Gray v. Shinn*, supra, thus: Did the ultimate reversion descend to each particular life tenant directly as heir-at-law? If so, the destruction would not occur. If not, it would. The answer must be in the negative, it would seem, as the full reversion in the particular portions did not result in the individual life tenants except by operation of the agreement, which, by virtue of its construction as a partition agreement, accomplished that effect.

The situation seems to be a novel one.

E. M. L.

INTERNATIONAL LAW—DEVISE TO AN ALIEN ENEMY.—In the case of Kielsmark's will (*Bieber v. Iversen*, Appeal of Palmer, Alien Property Custodian, Iowa, 177 N. W. 690), it was held that a devise to alien enemies resident in Germany was not void.

It was contended by certain resident heirs in this case that as to this property, Anna Kielsmark died intestate. The alien property custodian appeared and joined with the proponent in an effort to have the will probated and made effectual.

If the property of alien enemies were allowed to be sent abroad it would, of course, add to the resources of the enemy and to that extent weaken the power of the United States. There was some confusion in the early cases as to the effect of a declaration of war upon the property of enemies. It was asserted by some that a declaration of war in itself served to confiscate enemy property; by others that it conferred the right to confiscate, but that some affirmative legislative act was necessary before actual confiscation could take place. Either view was based upon the right of the state to use such means to weaken the enemy, and was justified by a state upon the ground of self-preservation. See the statement of these views in the case of *Ware v. Hylton* (1796), 3 Dall. 199. The Supreme Court of the United States, however, as early as 1814 announced that the principle universally recognized was that of forbearing to seize debts and credits, and that the right to them revives on the restoration of peace: *Brown v. United States*, 8 Cranch 110.

War cuts off the right to trade or have intercourse with the enemy (*Kershaw v. Kelsey* (1868), 100 Mass. 561), and dissolves partnerships where the partners are resident of the countries at war with each other (*Griswold v. Waddington* (1819), 16 Johnson's Reports 438), and terminates contracts that cannot be performed without trade or communication with the enemy (*N. Y. Life Ins. Co. v. Statham* (1876), 93 U. S. 24).

It is the practice of states at war to provide by legislation for some means whereby the state may avail itself of the opportunity of using the resources of the subjects of the enemies that are within its domain. Thus in the present war the Trading with the Enemy Act (U. S. Com. Stat. Ann. Supp., 1919, sec. 3115½ A) provided that any individual, partnership or other body of individuals resident in a country with which the United States was at war, or resident outside of the United States and doing business within such territory, and any corporation incorporated in a country with which the United States was at war should be considered an enemy of the United States, and that it should be unlawful either to trade or attempt to trade with them. The purpose of this statute was well defined in an earlier decision of the Iowa Supreme Court:

"The object is not to defeat the alien enemy of his right to recover whatever may be owing him nor to shield the citizen from the enforcement of his just obligations, but to obviate any advantage being derived by the enemy, directly or indirectly, pending hostilities": *Weiditschka v. Supreme Tent, Knights of Maccabees*, 175 N. W. 835 (Iowa).

This act also provided that such property should be taken over by the alien property custodian and held under his direction or management and the proceeds to be taken by him for the use of the United States during the period of hostilities. It can readily be seen that the real object of this statute was to increase the strength of the United States by allowing the use of such property during the period of the war—establishing a trust or trust fund of the property in favor of the individuals to whom it should eventually go. So long, therefore, as the property did not pass out of this country it could not furnish aid or comfort to the enemy and it was proper therefore to hold that it should pass to the alien property custodian pending the termination of the war.

It is believed that this holding is in accord with a recognized principle of international law and renders effective the purpose of the Trading with the Enemy Act.

CHARLES H. WATSON.

EASEMENTS—WHEN APPURTENANT—EXTINGUISHMENT.—The case of *Gulick v. Hamilton*, 287 Ill. 373, 122 N. E. 537, is to be welcomed as another substantial addition to the Illinois law on a difficult subject. The opinion in that case is set forth with the succinctness of expression and soundness of interpretation for which the particular judge writing it has gained merited reputation.

In that case, a common owner of certain property, in conveying parts thereof, as to the first several parts conveyed, excepted a strip bordering the ends of the lots, which strip was referred to in the deeds as an alley. The last part of said property thus originally owned by the grantor was conveyed without excepting therefrom any portion or strip, but, instead, the deed included a covenant that the west ten feet (being a continuation of the alley referred to in the other deeds) should be left open as an alley.

Upon this situation two considerations arose. Of these, one was whether the easement by virtue of that alley was one appurtenant, or one in gross. Following the well-established rule that the presumption is in favor of an easement appurtenant, as against one gross (*Whittaker v. Harding*, 256 Ill. 150; *Goldstein v. Raskin*, 271 Ill. 250, 252), the court concluded it must be held appurtenant.

The other consideration revolved upon these facts: that an extension had been built and maintained from the premises of the defendant, jutting out over the way, and that the complainants themselves had extended areaways from their premises out into the way, and also a chute a little over three feet into the way.

Bearing in mind the rule that an easement may be extinguished in one of four ways, viz.: (1) Through non-user acted upon; (2) through non-user with intention to abandon; (3) through unity of possession or merger, and (4) through a license that tends to extinguish it, it would seem that the contention that the facts above set forth operated in extinguishment of the easement in the principal case, is referable to the two modes of extinguishment first above catalogued. Thus the evidence of acts by the defendant or

his predecessor, in building out the extension over the way, could so operate, if at all, only as a "non-user acted upon," and the evidence of the acts by the complainants only as a "non-user with intention to abandon." As to both, the court in the principal case shows that the acts, in order to amount to an acting upon a non-user, or an intention to abandon, must be inconsistent with the continued use of the easement as such, and obviously the acts pointed out in this case were not such.

The earlier authorities bear this out: *Newell v. Sass*, 142 Ill. 104; *Yeager v. Manning*, 183 Ill. 275; *Nelson v. Randolph*, 222 Ill. 532; *Dallenbach v. Burnham*, 248 Ill. 470; *Wood v. Carter*, 70 Ill. App. 217. Indeed, with reference to acts of the dominant owner amounting to an intention to abandon, it would be necessary almost, it seems, to have adopted a new way, as appears by the case of *Dorman v. Droll*, 215 Ill. 262. Where, the court suggested, with reference to the extinguishment of an easement of drain by non-user with intention to abandon, it would be necessary to have actually constructed a new drain, and merely marking out the line of one proposed would not be sufficient.

E. M. L.

INCOME TAXATION—REVENUE ACT OF 1913—INCREMENT OF TRUST ESTATE ACCUMULATED FOR UNASCERTAINED BENEFICIARIES.—In *First Trust and Savings Bank v. Smietanka*, ... Fed. ... (C. C. A., 7th Circuit), recently decided, the Circuit Court of Appeals gives ground of encouragement to those income taxpayers (whose name is legion) who feel that they have been injured by reason of strained interpretations by Treasury Department agents or officials of provisions of the federal income tax acts.

The case arose under the Revenue Act of 1913, the first statute based on the Sixteenth Amendment. Otto Young of Chicago had died, leaving a trust estate, part of the income of which was accumulating for certain unknown heirs. The Commissioner of Internal Revenue had assessed an income tax on such income, by virtue of a Treasury Department ruling of July 26, 1915, which declared:

"Any part of the annual income of trust estates not distributed becomes an entity and as such is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary, such income will be taxable to the estate as for an individual and the fiduciary will pay the tax, both normal and additional."

The trustee paid this tax under protest and sued to recover it, but, on demurrer to its declaration, judgment had gone against it in the District Court.

The Court of Appeals (by Baker, circuit judge) pointed out that this ruling of July 26, 1915, was in conflict with a long line of prior rulings of the Treasury Department and declared that, as far as the Revenue Act of 1913 was concerned—

"nothing could be clearer than the absence of any legislative intent to

tax a property increment which during the tax year had no owner in being who received or was entitled to receive any of such increment."

It, therefore, reversed the judgment and remanded the case.

In the opinion the court calls attention to the "tendency of tax officers to increase the revenues by implications and strained constructions," and declares that the ruling of July 26, 1915, was "based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person and upon exactions contrary to the exemptions in the Act of 1913."

The court also cites with approval *Gould v. Gould*, 245 U. S. 151, to the effect that "all doubts respecting scope and meaning [of tax laws] are to be resolved in favor of the taxpayer." This doctrine, not much heard of before *Gould v. Gould*, has been repeatedly approved and applied since that case was decided, its growing favor with the courts being doubtless due to the fact that the present federal tax laws, with their high rates and great complexities, are full of danger of grave hardship to the taxpayers.

Many persons in close contact with the administration of the federal tax laws have been surprised at the smallness of the number of suits that have been brought by dissatisfied taxpayers, especially since the ending of the war has removed one important reason for failure to sue. The case under discussion, however, is probably merely a forerunner of many others, and doubtless in a large number of them the taxpayer will win. It would be miraculous if an organization as large and as new as that of the Bureau of Internal Revenue had not made many mistakes in favor of the government. And the courts, of course, are open to taxpayers who feel aggrieved and are ready to consider claims of illegal tax exactions on their merits and to give all proper relief, as in this case. J. J. F.

RECENT CASES

[Contributed by the Undergraduate Board]

CONVEYANCE—MORTGAGE IN FORM OF DEED IN FEE SIMPLE—EQUITY.—In the case of *Totten v. Totten*, 294 Ill. 70, 128 N. E. 295, the court looks behind the form of a conveyance in fee and calls it a mortgage. The facts of the case and the opinions, three justices dissenting, are interesting as showing the length to which equity will go to determine intention.

A short form warranty deed in regular form, purporting to convey the fee to certain property in Winnetka was given by Harry Totten to his uncle, Enoch Totten, a well-to-do Washington lawyer. It was given for a consideration less than half the fair value of the land. Harry, with various members of his and of his uncle's family, occupied the property continuously up to the time of this suit, and taxes on the property, since the conveyance, were paid at different times by Harry and Enoch. After Enoch's death his widow continued his contributions to the struggling relatives, but four years after her death their children filed this bill for a partition of the property.

In looking at the conveyance the court found that the intention of the parties was as follows: Harry was to convey the property to Enoch to secure the loan of sufficient funds to pay off a prior mortgage on the property; Enoch was to hold the title to the property until Harry should extricate himself from financial difficulties, and should redeem it; this holding of the title by Enoch was to assure the continuance of a home for Enoch's relatives; Harry was not to pay interest on the loan. On these grounds it was held that the deed was in fact intended to be a mortgage, and the court gave effect to that intention, on evidence which, though conflicting, was still clear and convincing. Moreover, the court looked at not only the evidence bearing directly upon the giving of the conveyance, but also upon the circumstances of the parties, as throwing light upon their intention.

The controversy, which evoked three dissenting opinions, turned largely upon the construction of facts, the law in the case being almost undisputed. A very close question was presented and the case is most interesting in respect to the able and eminently equitable conclusion reached from a confusing set of facts.

CRIMINAL LAW—STRICT PROOF REQUIRED WHERE EVIDENCE IS CIRCUMSTANTIAL—PREJUDICIAL ERROR.—The case of *People v. Lorrells*, 293 Ill. 591, 127 N. E. 651, bears directly upon the question of convictions based on circumstantial evidence. Lorrells was accused of the murder of his wife, but there were no witnesses to the deed, no confessions, and he was convicted only because he was apparently the only man enough interested in his wife to kill her.

The Supreme Court of Illinois was insistent in its demand for fair play and a conclusive chain of logic where the evidence was only circumstantial.

On the trial a too zealous state's attorney asked a question concerning the testimony of a witness at the coroner's inquest, the witness having since died. The question bore on a point as to which there was no other testimony, and although the trial judge sustained an objection to it, the Supreme Court held that the mere asking of the question was sufficient to supply a missing link in the minds of the jury, and therefore constituted prejudicial error.

In a day when there is a loud demand for convictions and more convictions it is perhaps well that the Supreme Court of the state should uphold the old cardinal theories of fair play and justice for all, which are our heritage from the ancient common law.

FEDERAL CORPORATION EXCISE ACT—INTERNAL REVENUE.—Section 38 of the Corporation Excise Act of 1909, in fixing the basis upon which taxes shall be assessed upon corporations, allowed for a deduction from the gross income of the amount of interest paid on its bonded indebtedness, in so far as the indebtedness did not exceed the paid-up capital stock. In the case of *Boston & M. R. Co. v. U. S. C. C. A.*, 265 Fed. 578, the phrase 'paid-up capital' is interpreted. It was held that the corporation could not treat as paid-up capital, in order to ascertain the deductions, premiums received from the sale of stock, when the stock was sold above par. The corporation contended the meaning of the phrase should be influenced by the Massachusetts statutes. However, this contention was overruled, the court holding such a principle would destroy the uniformity of federal taxation.

INSURANCE—PUBLIC POLICY—RIGHT OF PARTIES TO CONTRACT FOR THEMSELVES.—*Becker v. Interstate Business Men's Association of Des Moines* (1920, 265 Fed. 508) presents an interesting ruling on the public policy which governs (or does not govern, as the case was here) insurance contracts. The contract in this case contained an "eye-witness clause" which provided that there "should be no liability . . . for the payment of any sum on account of a bodily injury produced by (1) the discharge of firearms, (2) poison, or (3) where the body is not recovered and fully identified, unless the claimant shall establish the accidental character of the injury by a person other than the member or the claimant who was an eye-witness of all the circumstances of the casualty." The widow of the deceased proved that her husband had died as a result of the discharge of a firearm, but was not permitted to recover because of the lack of an eye-witness.

The question of public policy was thoroughly reviewed by the court, but although the court admitted the inconvenience occasioned members of the insurance company if the courts required them to have an eye-witness present should they meet with any of the mishaps of life, still the court could see no reason why "parties

may not contract, if they so desire, that the insurance shall be paid only for an injury that is established by the testimony of one or more eye-witnesses. . . ."

SALE—RESCISSION—WAIVER.—The case of *Cenner v. Borland-Grannis Co.*, 294 Ill. 58, 128 N. E. 317, decided that the acceptance and use of an automobile for four months will not necessarily constitute a waiver of the purchaser's right to rescind the contract and recover payments. It seems to be an essential part of the rule laid down in this case that the defects upon which the rescission is based must be of such a nature that only such continued use will show their existence. The length of time which is reasonably necessary to discover such defects will be left to the jury to decide, but this decision perhaps manifests a tendency of the court to adapt itself more and more to industrial needs. The increase in the number of automobiles, and the peculiar nature of their construction doubtless led the court to amplify the period of what is in law a reasonable time for the discovery of defects in workmanship.

WORKMAN'S COMPENSATION ACT—EMANCIPATION.—*Iroquois Iron Co. v. Industrial Commission*, 294 Ill. 106, 128 N. E. 289, bears on the subject of emancipation of an infant, and arose in the controversy of a claim under the Workman's Compensation Act. The minor, a son of the deceased, filed a claim under this act, and was denied recovery as being emancipated and so not entitled to the support of the deceased. Here the minor was in the military service with the deceased's consent, and the court, in considering this new question in this state, held that since the minor, by the voluntary act of the deceased and himself, by enlisting, ceased to be part of his father's family and put himself under the control of the government, he is emancipated so long as this service continues.

TRADE NAMES—PREVENTION OF UNFAIR BUSINESS COMPETITION.—The case of *W. R. Speare Co. v. Speare et al.*, 265 Fed. 876, was another nail in the coffin of unfair business competition. W. R. Speare, an undertaker, died and bequeathed his business and good-will, built upon thirty-five years of efficient service, to his brothers. His wife organized the V. L. Speare Company and continued in business in the same building occupied by her husband prior to his death. The bill was brought against the wife to enjoin her from carrying on an undertaking business under that name and under those conditions.

The court enjoined her from proceeding with the business under that name and in that building, from using the word "Speare" as the name or part of the name of such business unless accompanied by the words "neither the successors of, nor connected with, the original W. R. Speare establishment," which words must be included in any advertisements and signs of the V. L.

Speare Co., in appropriate juxtaposition with the name and in conspicuous letters. There were other provisions in the injunction, but these well express the gist.

In so decreeing the court showed its willingness to go into minute details in order to suppress unfair competition and thereby prevent deception of the public as to the identity of any business. The court did not, of course, deny the right of any person to use his or her name in a business, but insisted that it should not be used in a manner calculated to deceive the public.

One of the significant facts of the case was that no deception of the public was proved. The court in commenting upon this fact said that no such deception was necessary, and it was sufficient that there be present a likelihood that the public will be deceived.

JURISDICTION—POWER OF MILITARY COURTS LIMITED BY CIVIL COURTS.—The case of *Anderson v. Crawford*, 1920 (Kansas), 265 Fed. 504, presents a most interesting illustration of the limitations placed upon the military authorities by the civil courts. The court-martial sentenced one Crawford under A. W. 58 (R. S. sec. 1342), authorizing courts-martial to punish the offense of "assault and battery with intent to kill." Crawford had shot at a fellow-soldier with intent to kill, but the court found the element of battery wanting, saying (507):

" . . . The Article of War (58) conferred jurisdiction upon a general court martial to try and punish the offense of assault and battery with an intent to kill, but it did not confer jurisdiction over a charge of assault with intent to kill. It was not alleged that in making the assault by shooting at Watkins, appellee wounded him, or in any way caused any force to be exerted upon the person of Watkins . . ."

The court then entered into an elaborate technical discussion of the common law distinction between assault and battery, and finally concluded that, as no battery had been alleged, the military court was ousted of its jurisdiction.

DIVERSITIES DE LA LEY

A GLIMPSE AT WORLD-LAW IN THE MAKING.—1. There are two kinds of World-Law (see these *Diversities*, ILLINOIS LAW REVIEW, XV, 52). One is our pristine friend, so sorely maimed in the world war, the law for nations as political entities, *i. e.*, *international law*. The other is a new genus, the law for individual citizens, but a law accepted as common to two or more nations—law made uniform, or conformed to a common type, *i. e.*, *supernational law*. At least, it will some day be *supernational*, when sanctioned by a federal power of some sort. Meantime it rests on contract, and is generated by conferences, which add new subjects to its domain from time to time.

2. The greatest single agency—as yet, almost the only one—for generating this type of world-common law is the Pan-American Financial Conference, embracing twenty-five American republics, North, South and Central. The first conference took place at Buenos Aires in 1915. The second conference had its sessions at Washington in January last.

In the interim between conferences, its results are gleaned and its new plans worked out by a permanent body consisting of nine presidential appointees from each nation. This body, originally known as the International High Commission, is hereafter to be termed (more appropriately) the *Inter-American High Commission*.

Its duty is to secure the practical realization of the resolutions of the Pan-American Conferences. And its procedure is for each national "section" to present and secure the enactment of appropriate legislation, treaties, and executive regulations by its own nation's authorities; and also to correspond with all the other national "sections" in framing uniform texts for this purpose. Its Central Executive Council is located at Washington, and the ex-officio president is the Secretary of the Treasury, Mr. D. F. Houston. The vice-president is John Bassett Moore; the secretary-general, Leo S. Rowe; the pro-secretary-general, C. E. McGuire, and the juristic expert, G. A. Sherwell.

3. Its procedure has been effective because it is freed from the trammels of ordinary diplomatic formalities. For example, if the Brazilian and the Argentine sections agree with the United States section upon a draft of a warehouse receipts bill, the United States members can then appear personally before the Senate Committee, and explain and testify for the draft, which neither the Brazilian nor the Argentine Ambassadors can do. And the United States members, furthermore, can lay the draft directly before the officers of the U. S. Chamber of Commerce or the American Railway Association, and invite their advice and support, which, again, the ambassadors could not do.

And so, in the few years of its existence, the Inter-American High Commission has accomplished more for progress, by way of

conformity in commercial law and financial comity, than probably could have been effected in two decades of ordinary diplomatic negotiation.

4. This is not the place to enumerate the various results of its past labors. But its pending and future labors must now be applied to the resolutions adopted at the Pan-American Conference of last January. The intelligent support of the American Bar is needed for these proposals, and for the measures which the commission will draft to effect them.

A summary of them will therefore here be of interest. In perusing these resolutions (as unanimously adopted by the Committee on Resolutions) you will be a witness of world-law in the making. The list is as follows (only the purely financial and commercial ones being omitted):

II. *Resolved*, That the Conference adopt that part of the report of the Committee on Transportation and Communication relating to maritime transportation, and direct its transmission to the United States Shipping Board for consideration and action, and that so far as concerns the subjects of railroad transportation, postal facilities, uniformity of bills of lading, and wireless, cable and telegraph communication, the report be transmitted to the Inter-American High Commission for suitable action.

III. WHEREAS, Banks, both national and state, in the United States, have established branches in various Latin-American countries; and

WHEREAS, Restrictions exist under the laws of various states of the United States, which in effect prevent the operation of branches of foreign banks within their jurisdiction;

Therefore, we recommend that the legislation in such states be so modified as to permit the establishment of branches of banks of Latin-American countries, under proper regulations, so as to secure equality of treatment.

IV. *Resolved*, That the Inter-American High Commission be requested to study the question of the possibility of achieving uniformity and relative equality in the laws and regulations governing the organization of corporations and the treatment of foreign corporations in the various American republics.

VII. *Resolved*, That, steps having heretofore been taken to bring about the adoption by the American countries of a uniform law in regard to bills of exchange, the Conference requests the Inter-American High Commission to bring to the notice of the American governments the desirability of adopting a uniform law on the subject of checks.

VIII. *Resolved*, That, in view of the increase and diversification of taxes in the various American countries, the Inter-American High Commission be asked to study the question of the best method of avoiding the simultaneous double taxation of individuals and corporations as between such countries.

IX. WHEREAS, The International Bureau, at Havana, for the registration of trade-marks, as provided in the convention adopted by the Fourth International American Conference at Buenos Aires in 1910, has been opened and is in successful operation.

Resolved, That the Conference recommend the early ratification of that Convention by all the American countries that have not so far

ratified it, to the end that its provisions may be effective throughout the Americas.

Meanwhile, it is suggested that, pending the establishment of the International Bureau at Rio de Janeiro, consideration be given to the use of the Havana Bureau by countries of the Southern Group that have ratified the convention.

X. *Resolved*, That the Conference recommends the early ratification by the American Republics, so far as they have not already ratified it, of the Convention adopted by the International American Conference at Buenos Aires, in 1910, concerning Patents and Copyrights.

XI. *Resolved*, That the Conference recommends that the Webb Law be so amended as to permit American companies, importing or dealing in raw materials produced abroad, to form, under proper governmental regulations, organizations to enable such companies to compete on terms of equality with companies of other countries associated for the conduct of such business.

XIV. *Resolved*, That the Conference recommends that the Metric System of weights and measures be universally employed, and that, pending the attainment of that end, articles weighed and marked, and shipping documents prepared according to the system of weights and measures now prevailing in the United States, should be accompanied with statements giving the equivalents under the metric system.

XV. *Resolved*, That the plan of Arbitration of Commercial Disputes put into effect between the Bolsa de Comercio of Buenos Aires and the United States Chamber of Commerce, and since adopted by the Chambers of Commerce of several other American countries, should be extended to all the American countries, and that legislation should be adopted, wherever it is now lacking, for the purpose of incorporating the arbitral settlement of commercial disputes into the judicial system, to be carried out under the supervision of the courts.

XVI. *Resolved*, That the Inter-American High Commission be requested to study the question of the creation of an Inter-American Tribunal for the adjustment of questions of a commercial or financial nature, involving two or more American countries, and the determination of such questions on principles of law and equity.

J. H. W.

WHAT IS LIBERTY?—IS IT AN ACT?—IS IT A RELATION?—In the Hohfeld System of jural relations, which has become celebrated by reason of its adoption as a scholastic method (benevolent sense intended) at one of the great American law schools and by wide acceptance elsewhere, as appears from an inspection of contemporary legal writing, the idea of *liberty* under the term 'privilege' has been posited as a fundamental jural relation. Why the term 'privilege,' which in ordinary usage means an advantage "enjoyed by a person or body of persons beyond the common advantages of other individuals,"¹ was employed for 'liberty' is difficult to understand. In the actual use of the term by the Hohfeld School of jurists, a double and even a triple meaning is found, as has already been shown.² Perhaps this fact is the explanation. But use of 'privilege' in the sense of 'liberty' involves another serious objection.

1. Cent. Dict., s. v. "privilege."

2. Rev., XV, 24 (32).

There are four primary varieties of jural relation, as follows: (1) Where the dominus (holder) of the relation can require (attract) an act from the servus (bearer) of the relation: this is a right (claim) in the strict sense; (2) where the dominus can repel an act of the servus: this is immunity; (3) where the dominus can decline an act toward the servus: this is 'PRIVILEGE' in the correct sense; (4) where the dominus can project an act with legal effect toward the servus: this is a 'power' in the proper juristic meaning.

Jural concepts may be presented in two aspects—one static, the other dynamic. In their static aspect, jural and quasi-jural concepts are relational. Thus, if A has a power of agency as against P, this is a relation *only*, until the power is exercised; it is static. When, however, A acts as an agent (within the scope of his power), a jural *act* is presented; the act is the dynamic product of the relation.

Locke³ defines 'liberty' as—

"the power a man has to do or forbear doing any particular action [act], according as its doing or forbearing has the actual preference in his mind."

The distinction of static and dynamic concepts is of importance here. A 'liberty' is static and not dynamic. It is not an *act*, but a *condition*, physical or mental, or both. In essence, it is a capability of *choice*, a capability of acting; it is not the choice itself, or act of choosing; it is preliminary to action. The importance of the distinction may be seen in a comparison with an active jural concept. For example, power, in the jural sense, may be either a relation (static) or an act (dynamic). In the illustration above given, when the agent, A, enters into a jural relation with T for P, his principal, the *act* of entering into the relation is not merely the *exercise* of a power; it is a power.⁴ But when action follows a condition of liberty, there is merely an *exercise* of liberty; the act is not a liberty; it is not a *capability* of choice; it is the choice itself.

But, it may be answered, admitting that a liberty can never be an *act*, what objection is there to giving the *exercise* of a liberty the same name as the thing exercised, just as when the *act* of power bears the same name as the *relation* of power? Apart from the fact that this is arbitrary and that it unnecessarily and destructively changes the meaning of liberty, there is no objection; but if a liberty may arbitrarily be called an act, is it a relation?

In a discussion of 'relation' we need not tax ourselves with metaphysical distinctions. We need not inquire, for instance, whether liberty is real or conceptual. We may put aside the refine-

3. "Essay Concerning Human Understanding," II, 21, 15: quoted in Cent. Dict., s. v. "liberty."

4. Of the jural relations above described, two only can be *acted* by the dominus, viz., privilege and power. They may be either relation (static) or act (dynamic). It is, therefore, improper to speak of the exercise of a right (stricto sensu—claim) or of an immunity. In jural relations, the servus, also, may act two of such relations, viz., duty (correlative of claim) and disability (correlative of immunity).

ments about impossibility, equiparence, concatenation, acyclism, and other strange ideas which tend to make a mystery of logic. We leave all this to Duns Scotus. The lawyer's 'relation' is a simple one—it is a situation between two persons. We therefore repeat the question—Is liberty a jural relation? The question answers itself. A logician might, perhaps, call it a 'sibi-relation,' but juristically there is no relation at all, for the simple reason that *two* persons are not involved. If an owner of land contemplates walking on his land, he may have the physical power to accomplish his purpose, or he may not have the power. The law is in no way concerned. Apart from the question of his physical power, he has liberty of choice to do the act or to refrain. With this, also, the law is unconcerned. Whether liberty be regarded as physical or mental, or both, no one is connected with the liberty other than the person who is to exercise it. It is wholly unilateral in origin and consequence. At no point is any other person concerned or affected so long as it remains liberty, whether considered as a situation preliminary to action or as action itself. In every jural relation two persons are jurally associated.⁵

Liberty may, therefore, be important where it is necessary to determine assent for the existence of jural relations, but it seems clear that it can not, even in an enlarged sense, ever have the character either of a jural act or of a jural relation.⁶ A. K.

FIRESIDE EQUITIES.—In the *Clemmer* case, 57 Ill. App. 107, 109, Gary, J., delivering the opinion of the court, said: "What may be called the fireside equities of this case seem to me to be altogether with the appellees, but we are constrained to say the law is against them;" and the judgment below was reversed and the case dismissed. In the *Burton* case, 126 Ill. 599, 605, the justice delivering the opinion, quoting from a decision by the United States Supreme Court, said: "Waiving all considerations of the case, in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases." It is an easy matter to announce such a principle, but it seems not always to have been possible for courts, not even the highest court of this state, to strictly observe it and make it their sole guiding star in deciding cases before them. Every failure in this regard tends to render it uncertain to some—many or few—what the law is. Judges are

5. Of course, it needs no explanation that an excessive exercise of a liberty may invade the right of another, by which it becomes a wrong. At the point of invasion it has ceased to be a liberty. Likewise, one may have a liberty to exercise a jural power or not to exercise it; at the earliest point of action, it ceases to be liberty—it becomes a power.

6. 'Liberty' is used here in an extensive sense to include 'freedom.' In a stricter sense, 'liberty' is an *internal* state, a subjective capability of selection, while 'freedom' is like strictness is an *external* state, an objective capability of selection. Thus we speak of *liberty* of thought, of conscience, of opinion, etc., but *freedom* of action, of speech, of the press, etc. The law can not directly, in any way, affect *liberty*, but it may restrict *freedom*. Cf. *Del Vecchio*, "Formal Bases of Law," pp. 125 seq.

only human, and it would not be difficult to point out a number of decisions which seem to have been inspired at least as much by a regard for consequences as for the law. It will be sufficient to refer to but two which seem to have been so inspired, and they will be referred to because the facts, as to how they were brought about, have been told by the member of the court who wrote them, John D. Caton, ex-Chief Justice of the Supreme Court of Illinois, in two articles published in 1889 in Vol. 21 of the *Chicago Legal News*, pages 306 and 314-15: *The People v. Thurber*, 13 Ill. 554; *Shackelford v. Hall*, 19 Ill. 212. Whatever may be thought of the opinions filed in these cases, from the statements in Judge Caton's articles in the *Chicago Legal News* it seems to be quite clear that the members of the court first determined in whose favor they would decide these cases, and that afterwards most diligent search was made for some point of law that could be made to serve as a basis for their decision.

In the second of the above cases it appeared that Hall had made a will devising his property to his heirs at law, in the same proportion that they would take under the statute of descent in the absence of a will, upon the condition that if either of his children married before attaining the age of twenty-one years he or she should forfeit the estate so devised. One of his daughters married before she became twenty-one, and her brother filed a bill in circuit court to declare the forfeiture. The case was taken to the Supreme Court, and as to what occurred there, Judge Caton in his article in *The Legal News* said: "Upon the arguments for the complainant, the plaintiff in error, the violation of the condition subsequent was relied upon and that really was about all he had to say in the opening. For the defense it was claimed that the condition was in restraint of marriage, and, therefore void, but to this a conclusive answer was given that a reasonable restriction was not only proper but commendable, and that a restraint to the age of twenty-one years or even a greater age, was not unreasonable, and upon this the case was submitted. So soon as we reached the conference room with the record, Breese broke out and said: 'That brother is a mean fellow; yes he's a great rascal, and we must beat him if possible. Now, Caton, how can it be done?' I replied that the law referred to on the argument was certainly all in his favor, and I didn't remember any law to controvert that, and Judge Walker was equally at a loss to find any way to get around it. I then stated, that during the argument there seemed to me as if it were floating in the atmosphere, some intangible, undefined idea that I had seen something somewhere, some idea, derived from something I had read some time, probably when I was a student, when reading some text book, that might have some bearing on the case, but what it was I could not say. It was but a vague, indefinite impression, and seemed rather like a fleeting dream than a tangible idea; that I felt confident that I had never seen a case from which that thought had arisen, and that I felt no assurance that there was any principle laid down in the books in any way qualifying the decisions which seemed to be so directly in point holding that this condition subsequent was

valid. Breese then picked up the record from my desk and placed it in my hands and said: 'You take this record and hang on to the tail of that idea till you follow it up to its head, until you find some law to beat this unnatural rascal, who would cheat his sister out of her inheritance just because she wanted to get married a few months before the time fixed by the old man.' Judge Caton went on to say, in his article in the *Legal News*, that he took the record home with him, and that he did an immense amount of work, reading law book after law book, endeavoring to find something somewhere that would serve as a basis for a decision against the complainant, and that finally he found a short paragraph in a text book, to the effect that where a testator devises an estate to his heir and accompanies the devise with a condition of forfeiture, a breach of that condition shall not work the forfeiture, unless its existence is brought home to the knowledge of the heir; and that thereupon he wrote an opinion adverse to the complainant. Proceeding in his article he said: "When I read my opinion at the next conference Judge Breese especially manifested great satisfaction at the result of my investigations, and walked across the room and patted me on the back, saying, 'Well done, my good boy.'"

In regard to the decision in the first of these cases, in his article in the *Chicago Legal News* Judge Caton said: "Beyond comparison the most difficult task I ever assumed at the request of my associates was to write an opinion reversing the judgment in the case of *The People v. Thurber*, but it just had to be done. It would have been a very easy task to write an opinion affirming the judgment. . . . That was one of those cases where consequences had to be taken into consideration and given an absolutely controlling influence, and my duty was to hunt up shreds and scraps of statutes to sustain the decision, and relying as little as possible upon the consequences of an affirmation, which after all constituted really the controlling consideration. . . . Now this was the best I could do in support of a decision which had to be made, and as my associates could suggest nothing better it was made to pass." [Reprinted with author's permission from "The Cause of the Quips About Lawyers," by Walter Stager, Esq.—Eds.]

REVERSALS IN CRIMINAL CASES—SUPREME JUDGES VS. TRIAL JUDGES.—The June odds in this state on the chances attending an appeal to secure reversal of a criminal judgment, appear to be 3 to 1 in favor of the accused.

We have not tried to ascertain the odds for the judicial year just ended, but the contents of a single number of the *North-eastern Reporter* (July 20, 1920, Vol. 127, No. 9), containing a batch of decisions handed down on June 16, attracted our attention. It seems to be a good month for the accused; the chances are running very favorably. For those who are bored with campaign bets, or have exhausted the various combinations, it might be interesting, since the issue of the presidential campaign, to place a few bets on the figures for the decisions of the next term.

There were eight cases on June 16; of these, six were reversed, two affirmed.

As to offenses, the affirmed were, one for homicide and one for robbery; the reversed were, one for homicide, one for concealed weapon, one for indecent liberties, and three for confidence game. As to place of trial, the affirmed were, one in Macon County, one in Cook County Criminal Court; the reversed were, one each in Stephenson County, DuPage County and Alton, one in Chicago Municipal Court, and two in Cook County Criminal Court. This shows a scattering field, with the confidence game a prime favorite.

The high odds of 3 to 1 (judging at least from the June "dope-sheet") naturally raise the question: Who is responsible, the trial judges or the supreme judges? Are the trial judges not well qualified to rule soundly on the law? Or are the supreme judges over-technical in their censorship of the trial judges?

Must we not infer, provisionally at least, that one or the other alternative is true?

J. H. W.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION.—192. *Question:* A wife for adequate cause brings suit against her husband for a judicial separation. After its institution the husband's attorney, with the authority of his client, makes a proposition to the wife's attorney that if he will discontinue the separation action and bring action for divorce on the ground of the husband's adultery, the husband, who is willing to admit and confess an offense of adultery already committed, will make written confession and furnish the names of witnesses with knowledge of the fact to sustain the charge of adultery.

In the opinion of the committee would it be improper for the two attorneys, with the consent of their clients, to enter into and carry out an agreement accordingly?

Answer: The committee considers that attorneys should scrutinize with caution any offer by the adverse party to stipulate to furnish witnesses to the past offense charged, but it is of the opinion that it would not in itself be improper for the two attorneys, with the consent of their clients, in good faith to enter into and carry out the agreement described. This answer is based on the assumption that the question arises in a jurisdiction by whose law the agreement would not be deemed collusive. If the agreement were collusive as a matter of law, it would, of course, be improper.

While thus not condemning the proposed agreement, the committee repeats its opinion that in every case of this character each attorney should satisfy himself of his client's good faith, and of the absence of collusion; and that since the state has an interest in actions for divorce, which should be supervised by the court, the agreement or stipulation should be in writing and should be disclosed to the court in the divorce action, in order that the court may be put on notice of all the circumstances and make such inquiries as those circumstances may suggest—concerning, for example, the good faith of the parties, the absence of collusion, the

credibility of the witnesses, and the weight that should be given to the evidence. (See Question and Answer 163 suggesting special circumstances where an agreement would be improper.)

TECHNICALITIES AND CRIMINAL JUSTICE ONCE MORE.—Twelve jurors were sworn and duly qualified on voir dire, in a trial for murder; state and defendant accepted the jury, introduced their evidence, and rested; a recess of two hours was taken; and it was then discovered that the jurors after acceptance had not been sworn "to well and truly try the issue." The court then and there administered that oath, to which defendant objected. Argument proceeded; and a verdict of guilty was rendered.

Held, that the tardy administration of the oath could not cure this fatal error; Smith, C. J., and Ethridge, J., dissenting (Mississippi; *Miller v. State*, 84 So. 161). Here we are, then, no further along than the middle ages in our formalistic administration of criminal justice in the year 1920. Shall we never shake off the shackles of technicalism? "And He said unto them, woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers!"

J. H. W.

A CORRECTION.—In the October number of the *REVIEW* in an editorial note on the American Bar Association meeting (REV. XV, 198) it was stated: "Even the Conference of Commissioners on Uniform State Laws, though as industrious as usual, was unable to report a completed bill." We are informed that this statement (the latter half of it, of course) is incorrect. A survey of the work of the Conference will appear in a later issue of the *REVIEW*.—ED.

OUR CONTRIBUTORS.—EDWIN M. ASHCRAFT is a prominent member of the Chicago bar. HENRY W. BALLANTINE, at the time of writing the article which appears in the present number of the *REVIEW*, was dean of the College of Law of University of Illinois. He has since accepted appointment as professor of law in the University of Minnesota.—ED.

BOOKS AND PERIODICALS

FAIR VALUE: THE MEANING AND APPLICATION OF THE TERM 'FAIR VALUATION' AS USED BY UTILITY COMMISSIONS. By Harleigh H. Hartman, M. A., LL. M., Lecturer on Illinois Public Utilities Law at Northwestern University School of Law, Sometime Instructor in Economics at Lake Forest College. Boston and New York: Houghton-Mifflin Company, 1920. Pp. xiii + 236; bibliography, 239, 240; table of cases, 243-251; index, 255-263.

RAILROAD VALUATION BY THE INTERSTATE COMMERCE COMMISSION. By Homer B. Vanderblue, Ph. D., Associate Professor of Transportation in Northwestern University. Cambridge: Harvard University Press, 1920. Pp. 117; index, 118, 119.

The inconsistencies of the several 'value' theories applied to public utility rate-making are generally understood by this time. Men and women, great and small, in the dozen years preceding the war devoted a prodigious amount of time and energy to demonstrating to their own satisfaction, it is hoped, and to the ever-increasing despair of the conscientious student and practical appraiser the fallacy of market 'value,' original cost 'value,' reproduction cost new and less depreciation 'value,' fair 'value,' 'going value,' and various other 'value' theories as applied to this, that and the other items in the inventory under an infinite variety of circumstances. While the cauldron of amateur and professional opinion bubbled and boiled, the Supreme Court adhered steadfastly to the rule of *Smyth v. Ames*, which at one and the same time is the comfort and dismay of the voyager; and the rapidly multiplying public utility commissions pressed hither and yon for a logical solution of the practical problems of fitting the squarely outlined financial and producing utility structures to the nicely rounded symmetries of some "valuation" theory or other, which, after all, is little less remote from the every-day job of furnishing an ever-increasing supply of passenger rides, passenger miles, ton miles, kilowatt hours, thousand cubic feet, messages, and gallons to a voracious public than is Mars from the scene of intellectual exploits of which we speak.

The war brought a change. It accentuated the practical aspects of utility regulation. It emphasized the mobile nature of the business of supplying utility services. It demonstrated that a static condition does not prevail in the utilities of a vigorous, young nation such as ours, whatever may be the case elsewhere. It exploded the fiction widely acknowledged that a utility is a thing set apart from ordinary business affairs and governed by an entirely different set of rules. It shattered the 'monopoly' theory which decreed that a public utility, because of its monopoly of a supply, was a safe and sure investment and should be permitted only a minimum return.

It demonstrated that the law of supply and demand does not cease to operate when it approaches the domain of transportation, communication, light, heat, and power. It caused valuation theories to be swept into the discard—temporarily? Who knows?—while rates were fixed by public authority on the dominant and all-pervading principle that income must be sufficient to equal outgo and provide a surplus for credit, or the industrial structure of the nation will not only stand still in its growth, but will come crashing to the ground.

We are in a new era. We are emerging from a horrible experience. The test of our worth is our ability to salvage the good from the old era, connect it with the experience the cataclysm has given, and build a new house worthy of a new and broader vision of service.

Hartman and Vanderblue deal with different manifestations of the same subject. Hartman treats the subject generally. Vanderblue takes up a single angle, albeit one of the toughest. Each is expert at illuminating the flaws, the defects, and the inconsistencies. We agree that the verdict of 'guilty' is just. Judgment will be pronounced and the sanctity of the law will be . . .

But not so. Our industries are clamoring for transportation facilities. New homes are but waiting the next step in the process of readjustment to spring up with an enormous demand for the consumption of light and power hours and telephone calls. New subdivisions in cities large and small from one end to another of our land will soon be delivering new local transportation loads to already overworked street car systems. Instead of exposition of the "confusion in valuation law and practice" we need leadership in escaping from the "unavoidably incoherent." We know that the "individualistic idea of private property" and the "value concept" have fallen by the wayside. We seek the practical measuring rod by which the pathway of the future may be divined. We look upon the "development of the valuation theory" as expounded by Hartman, and are oppressed by the fear that only by Herculean efforts can the "theory" be saved from the maw of public ownership as a live subject of discussion and development.

If Vanderblue had suggested a 'way out' of the maze of railroad valuation which centers about the Interstate Commerce Commission we would be better satisfied with his admittedly excellent analysis. It is only a fair thing to give the devil his due and to say that the commission is a body probably as expert and as conscientious as could be gathered together, whose conclusions on debatable questions are at least honestly reached and earnestly subscribed to by the commission. If positions have changed since the valuations started, the commission and its agents are merely proved human. If their 'measuring rod' is inadequate, the author does not tell us what should be its substitute.

Vanderblue discusses the railroad valuation law from the standpoint of the transportation law of 1920 and the duty imposed on the commission to consider the effect of rate schedules on the ag-

gregate incomes of carriers, individually and in groups. He characterizes the act of 1920 as possessing "the frank aim of limiting maximum revenue." We believe this characterization belies the fact. To paraphrase his language, we should prefer to say that the act has the frank aim to insure minimum revenues required to maintain and develop the transportation machinery of the nation. If the one involves the other it is only as the corollary suggests the rule. Guaranty suggests limitation just as freedom from economic risk suggests a minimum of true profit. The distinction becomes important when it is considered that the act of 1920 will have failed of its purpose if the valuations fixed by the commission shall prove to be insufficient when coupled with the statutory rates of return of six per cent to sustain the credit of the corporations and enable them to buy the labor and the materials wherewith to supply facilities to carry the produce of a reconstructed America.

Both Hartman and Vanderblue seem to forget the corporation. The corporation is the agency with which the 'value theory' and the statute deal and on which they operate. The ties, the rails, the conduits, the cars, the wires are an inanimate expression of the human aspiration, ambition and energy harnessed in the form of a corporation. And as individuals differ the one from another, so must the corporations, which are the aggregates of individuals, differ. Some differences are attributable to nature—perhaps; others are attributable to opportunity, environment, and tradition. Criminology no longer deals with the subjects of its inquiries in the mass. Public service regulation will attain its proper aims more readily if it discards the mass theory of treatment and evolves a sympathetic system of individual treatment, not the least important factor in whose structure is the community service opportunity and aspiration. Neither Hartman nor Vanderblue stresses the dynamic in the public utility services. Each is oppressed by the static. The opportunities for homely, every-day service to men, women, and children latent in the railroad and public utility organizations now in existence are too voluminous for description. The vice of the 'fair value' doctrine and of the Transportation Act of 1920, including the Valuation Act, is that they make no adequate appraisal of these opportunities. Hartman and Vanderblue disappoint us by failing to rise above the level of the materials with which they work.

W. D. K.

SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS.

By Austin Wakeman Scott, Professor of Law in Harvard University. Cambridge: Published by the Editor, 1919. Pp. xiii + 842.

Ames' Cases on Trusts, with his scholarly and comprehensive notes, is not only an excellent collection for the classroom, but a rich repository of learning on the subject. For many years it has been used with satisfaction in all of the better schools, and doubtless there are many teachers who have been reluctant to give it up.

It is natural, therefore, to test Professor Scott's volume by a comparison with that of Ames.

The second edition of Ames is a volume of 527 pages, and chapters IV and V of the first edition, dealing with resulting and constructive trusts, which have been commonly used in connection with the second edition, consist of 135 pages, making 662 pages in all. Scott is a volume of 836 pages. Ames (including chapters IV and V of the first edition) contains 272 cases; Scott, 295. Yet the present writer has found by experience that in the time allotted to the course he has less difficulty in covering the subject with Scott than with Ames.

Of the 272 cases in Ames, Scott retains 115, and he adds 180 newly selected cases. Since most of the cases in Ames which Scott has discarded are English, and most of the added cases are American, the result is a much larger proportion of American, as well as comparatively modern, cases. Indeed, the extent to which well chosen, recent cases are used is a conspicuous feature of the book. This does not mean that the origins and earlier growth of trust doctrines have been neglected, but that in some measure the emphasis has been shifted to the more recent development of the law. It is believed that this will meet with the approval of teachers, and it has the incidental advantage of familiarizing students with current legal problems and modern ways of doing business, and thus of making the subject more vivid and realistic in their eyes.

In the main, Professor Scott has followed Ames' arrangement of topics. Ames' long first chapter, however, on the Nature and Requisites of a Trust, becomes, with some alterations, three chapters in Scott, and Ames' third chapter, The Transfer of Trust Property, is considerably rearranged and divided into three chapters—The Transfer of the Interest of the Cestui Que Trust, The Persons Who Are Bound by a Trust, and Liabilities of the Trustee to Third Persons. On the other hand, Scott employs section headings to a much less extent, and sub-section headings not at all. These changes make for better balance and a more freely flowing sequence, and are distinct improvements.

In the important matter of notes Professor Scott has shown both scholarship and good judgment. Realizing the invaluable character of many of Ames' notes, he has reprinted them in full, as corrected and supplemented by Ames' own manuscript annotations. To some of the less important of Ames' notes he makes reference. And he has added many valuable notes of his own, some of an historical character, others containing well selected and digested material supplemental to the printed cases.

It is inevitable that teachers will disagree as to the relative value of topics and of cases. Probably all will approve of Professor Scott's comprehensive treatment of resulting and constructive trusts—one of the most difficult parts of the subject—and of his inclusion of a number of good cases and notes on charitable trusts. His adoption of Ames' illuminating method of defining a trust by distinguishing it from other obligations will also be generally com-

mended. But doubtless some will regret that Ames' historical material for the study of the distinction between a strict trust and fiduciary obligations enforceable at law is not retained in toto or even expanded, though it is said that Professor Ames himself made little use of it in later years; that the subject of the duties of a trustee, other than those relating to the investment of funds, is not more fully treated; that more material is not provided for the study of the problems relative to the so-called "business trusts," which are becoming common in some parts of the country. The volume is quite large enough as it stands, however, and it may be questioned whether these omissions could have been avoided without the sacrifice of material which the majority of teachers would regard as more important.

It is a pleasure to record the judgment after a thorough trial, that this case-book is, on the whole, a teaching instrument of remarkable utility.

University of Chicago.

FREDERIC C. WOODWARD.

ARTICLES IN PERIODICALS

- TYRANNY OF THE TAXING POWER. *Andrew A. Bruce*. Mich. L. Rev. XVIII, 508.
- JOINDER OF ACTIONS. *Edson R. Sunderland*. Mich. L. Rev. XVIII, 571.
- IMPOSSIBILITY OF PERFORMANCE. *William H. Page*. Mich. L. Rev. XVIII, 589.
- FREEDOM OF SPEECH AND PRESS IN THE FEDERALIST PERIOD. *Thomas F. Carroll*. Mich. L. Rev. XVIII, 615.
- POWER OF CONGRESS TO DECLARE PEACE. *Edward S. Corwin*. Mich. L. Rev. XVIII, 669.
- EQUITABLE DEFENSES UNDER MODERN CODES. *E. W. Hinton*. Mich. L. Rev. XVIII, 717.
- EFFECT OF REBUTTABLE PRESUMPTIONS OF LAW UPON THE BURDEN OF PROOF. *Francis H. Bohlen*. Penn. L. Rev. LXVIII, 307.
- RIGHTS IN REM. *A. Kocourek*. Penn. L. Rev. LXVIII, 322.
- LEGAL THEORIES OF JAMES WILSON. *Randolph C. Adams*. Penn. L. Rev. LXVIII, 337.
- STUDY OF THE LAW. *W. W. Willoughby*. Va. L. Rev. VI, 461.
- THE TRANSPORTATION ACT. *Farney Johnston*. Va. L. Rev. VI, 482.
- NORTH CAROLINA V. NEGRO WILL: A CAUSE CELEBRE. *George G. Battle*. Va. L. Rev. VI, 515.
- JURISDICTION OF THE UNITED STATES DISTRICT COURT AS AFFECTED BY ASSIGNMENT. *Armistead M. Dobie*. Va. L. Rev. VI, 553.
- DEATH DUTIES. *R. W. Carrington*. Va. L. Rev. VI, 568.
- CONTEMPT IN PATENT CAUSES. *H. A. Toulmin, Jr.* Va. L. Rev. VI, 580.
- TEACHING PRACTICE AND PROCEDURE. *L. Carlin*. W. Va. L. Q. XXVI, 165.
- RULE IN SHELLEY'S CASE IN WEST VIRGINIA. *James W. Simonton*. W. Va. L. Q. XXVI, 178.
- SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS. *Thomas P. Hardman*. W. Va. L. Q. XXVI, 183.
- RIGHT OF REMAINDERMAN TO COMPEL LIFE TENANT TO PERMIT DEVELOPMENT OF OIL AND GAS. *James W. Simonton*. W. Va. L. Q. XXVI, 213.
- RIGHT OF STATE TO RESTRAIN EXPORTATION. *Thomas P. Hardman*. W. Va. L. Q. XXVI, 224.

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A CONSTITUTIONAL WAY TO REACH THE HOUSING PROFITEER

By JOHN H. WIGMORE

1. Is there not a constitutional way, and at the same time a equitable and practical way, by legislation, to reach the housing profiteer and to relieve the home-seeker from extortion?

I believe that there is, viz., to *declare the business of renting homes for hire to be impressed with a public interest, to place it under the police power of the state, and to appoint an administrative commission to regulate its rates and performance of service in the same manner as warehouses, carriers, and other such business impressed with a public interest.*

2. What we now have is, on the one hand, an economic monopoly which is said to be abused by a large number of greedy beneficiaries, and a condition of homeless distress and exorbitant rents which is shocking humanity; and, on the other hand, a popular panicky demand for radical laws which would distort the normal law and invade ordinary property rights in a fashion wholly intolerable to the honorable property owner and probably unconstitutional and therefore futile in the end.

It must be admitted that the present situation, however urgent and however permanent, does not justify wielding the axe upon private property rights in general. It is also true that some of the measures hitherto proposed would operate alike upon the just and the unjust landlords and tenants, and would thus be in themselves unwise. It can also be asserted that while some of these measures are futile to reach the evil, still others, which would be effective, would be unconstitutional through their very effectiveness. And finally, many of them call for administrative action, which no

ordinary city court is equipped to give; hence, they would merely result in crowding the courts with litigation.

On the other hand, it must be conceded that the state and the law are bound to meet the situation, and cannot look helpless at a condition which is universally distressing. It is a disgrace to civilization that honest families should go homeless if housing-profiters demand obviously exorbitant rents. It is a shame to our laws of property if landlords should be permitted to extort 100 per cent more than they received in 1914 merely because of an economic accident that gives them a practical monopoly. The economic situation of the tenant-family is one which no humane sentiment can contemplate with equanimity. It calls for a remedy. And it cannot wait for the slow and problematic readjustment of demand and supply. We may start from the proposition that common humanity requires us to seek a remedy, if one can lawfully be found.

3. A New York judge has recently held void some of the remedies recently enacted by the New York legislature.

What were those measures? They were signed by the governor on September 27, 1920, and have been thus summarized (*New York Times*, Sept. 28, 1920):

"1. Proposal of the Joint Legislative Committee on Housing, amending the Summary Proceedings Act to apply to a city of the first class. Its provisions are to be liberally construed. Any building in the course of construction, or which shall be commenced after today and up to November 1, 1922, is not affected.

"2. The bill introduced by Senator Law of Westchester, taking jurisdiction of civil actions for the recovery of rent or of summary proceedings out of the hands of the justices of the peace in second-class cities which adjoin a city of 1,000,000 or more population. This bill applies to Yonkers alone.

"3. The joint legislative committee's bill exempting new buildings to be used exclusively for dwellings from local taxation. The exemption is discretionary with local authorities and is to continue until January 1, 1932. The exemption is to apply only to construction completed since April 1, 1920, or which shall be commenced before April 1, 1922, and completed within two years.

"4. The joint legislative committee's bill giving tenants the right, where dispossession proceedings are started for a default in rent, to set up the defense that the rental is unjust and unreasonable, and that 'the agreement under which the same is sought to be recovered is oppressive.' This law requires the landlord or owner, on the commencement of the tenant's action, to file in court a verified bill of particulars in relation to the building and his income from it. The bill does not apply to a hotel having 125 rooms or more or to a lodging or rooming house hired for a week or less.

"5. A companion bill enacted to protect landlords in dispossess proceedings where a tenant raises the question of unfairness of rents, which will compel the tenant to deposit with the court an amount equal to the amount paid as rent during the preceding month.

"6. The Housing Committee's bill, which extends liability to the agent, manager, superintendent or janitor of any building for failure to furnish hot or cold water, heat, light, power, elevator and telephone service and other facilities. Wilful violation of this act is made a misdemeanor. It takes effect immediately.

"7. Extending the time from three to five to ten days in which precepts must be returnable in summary proceedings.

"8. Permitting summary proceeding actions heretofore limited to municipal courts to be presented to the Supreme Court and Appellate Division in the case of holdover tenants after default in the payment of rent.

"9. The Housing Committee bill permitting courts in which summary proceedings have been commenced to vacate final orders rendered upon the default of the tenant."

These laws represent four types of remedy: One class gives tax exemptions to encourage new building; another class facilitates court procedure in minor details; a third class checks the landlords who seek to circumvent the tenant by refusing light, heat, and other incidental services; and the fourth class suspends the remedy of eviction for non-payment of rent, sanctions the defense that the rent is unreasonable and oppressive, and obliges the landlord to furnish the facts upon which this plea can be determined; this measure to remain in force for two years.

The fourth and last is the drastic and supposedly effective remedy. It was expected to nullify 100,000 pending proceedings for eviction, and to postpone "moving-day" in New York City until November, 1922.

This remedy, however, rests on the assumption that the rate of rental for a leasehold of private property can be lawfully fixed by the court in a judicial proceeding, and on the further assumption that such a mode of determining a reasonable rent-price is feasible and effective. It is to both these fundamental assumptions that doubt applies. On November 1 this doubt found expression in the ruling of Supreme Justice Hotchkiss that c. 947 of the foregoing act was unconstitutional.

There is probably no known principle of the law on which the owner of private real property, merely as such, can be made to accept any price other than the one he demands; nor upon which the terms of a contract of lease already made can be altered by a court. Moreover, a court's machinery for investigating the cost of

building and of rental service is so imperfect that the result is likely to be either unjust or futile.

These are not final reasons for refusing to try these measures at all, but they are at least reasons for asking whether the law does not already supply somewhere a better principle.

4. That better principle is found in the established doctrine of *Munn v. Illinois*, 94 U. S. 113, viz., that *where property is so held that the facts give to its owner a practical monopoly, and where the service rendered by the property-owner is a service necessary to industry, the property is impressed with a public interest, and its use therefore becomes subject to legislative regulation*, by virtue of the police power of the state; and that this regulation can be effected through an administrative commission empowered to fix reasonable rates and reasonable conditions of service.

The pertinent language in *Munn v. Illinois* is familiar to all lawyers:

"The police powers, as was said by Mr. Chief Justice Taney in the *License* cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens, one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread,' 3 Stat. 587, sec. 7; and, in 1848, to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers,' 9 Stat. 224, sec. 2.

"From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amend-

ment does not change the law in this particular; it simply prevents the states from doing that which will operate as such deprivation.

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise '*De Portibus Maris*,' 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

That the principle of *Munn v. Illinois* is applicable to still other forms of property-holding is convincingly asserted by federal Judge Baker, in his recent opinion on the Indiana Coal and Food Act (*American Coal Mining Co. v. Special Coal and Food Commission of Indiana*, Sept. 6, 1920):

"There is no distinction as to the source of power of regulation. It all comes from the police power. Dividing that into the two subject-matters upon which the police power operates (the one based upon the public franchise or the like, and the other upon abuses of the theretofore existing right of private contract or private property), when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case when extortion is also found to be the evil you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. . . . When it comes to regulating the returns that a man shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the legislature has found that he has been bludgeoning the people. . . .

"There has been one statute that from the earliest times has stood over on this side of the line purely as an interference with the right of contract, and regulating the price. Take the case of the lender making a loan to a man at usurious interest. Now, what is a loan? A loan is really a sale. Title passes at once. Money is a commodity. Bankers buy and sell money. Now, here is one line of business that never has depended, as a basis for control, upon the power of eminent domain, or a public service. It is a private business. Nothing could be more private than the pawnbroker's business, and yet, from time immemorial, it has been unquestioned that the power existed to regulate

that business by fixing the prices for money. I am unable to distinguish the underlying principle in that case from this, *or from the statutes regulating rentals*. I know, from common knowledge, that the State of New York has had under consideration such a statute, and Wisconsin has passed a law regulating rentals under certain conditions and during certain times. That is, there was a finding by the people of Wisconsin, who were the absolute sovereigns in all respects over every person and every piece of property in that state (except to the extent that sovereignty had been surrendered to the Federal Government) through their agent, the legislature, that extortion was being practiced by landlords. . . . Are the sovereign people helpless in such a situation? They certainly are if the fourteenth amendment stopped the narrowing of these various circles within which persons theretofore might move freely with respect to life, liberty and property. But otherwise, not. The police power is continuous. It has always existed, and, necessarily, must always exist. . . . There may be, today, wholly private businesses that we would have no hesitancy, today, in saying were beyond the reach of the legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding. But our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprises, within the regulation of the state, under its police power."

Mr. Glassie, of Washington, D. C., has recently published an able defense of the proposition that the business of offering homes for hire is affected with a public interest and therefore subject to regulation.¹

5. The housing situation today brings within the principle of *Munn v. Illinois* the business of leasing homes for hire. The home is a fundamental necessary of social life—more obviously so than the railroad car, the warehouse, the telegraph or the telephone. And a practical monopoly exists. The absolute number of warehouses or homes is immaterial; the essential feature is the actual relative fewness in the supply of either, compared to the demand for them, and the practical impossibility of enlarging the supply. Every house-owner therefore, who, having no need of the house for his personal use, offers it on the market for lease to any person bringing the price and fulfilling other general requirements, is in the business of rendering the housing service. He is offering dwelling to humans, just as the grain warehouseman in *Munn v. Illinois* was offering storage place for grain. If the service of storing grain is impressed with a public interest, much more so is the service of housing human beings.

1. Virginia Law Review, VII, 30 (Oct., 1920).

All that is required therefore is that the legislature shall decide and declare that the service of housing is impressed with a public interest, and the Supreme Court will not impugn the correctness of the legislature's decision on that point.

6. Much may be said contra to this proposal—much of its theoretical and much of its practical soundness. And much could be said pro its correctness in rebuttal.

However, all that is here desired is to publish the proposal for discussion. It seems simple; it seems lawful; and it seems fair and effective. This being so, it should be ventilated. And, thus far, it does not seem to have been elsewhere proposed.

7. As illustrating the possible form of such an act, the following draft is here offered:

AN ACT TO EXERCISE THE POLICE POWER TO REGULATE THE BUSINESS OF HOUSING AND TO APPOINT A COMMISSION THEREFOR

Section 1. *The operation of the business of housing, that is, of leasing a building, or part thereof, for dwelling purposes, is hereby declared to be affected with a public interest, and therefore to be subject to regulation by the state under its police power.*

Section 2. *Any person having title to a building, by estate in fee simple or any lesser estate, or to any part thereof, who offers for lease upon valuable consideration, for a period longer than one week, to any person not in his own family or in his employment, for use as a dwelling, any building, or part thereof, not personally used by himself or family or employees, is deemed to be in the business of housing, and shall in the operation of that business be subject to the provisions of this Act.*

Section 3. *The Housing Commission, herein created, is empowered to control and supervise the operation of every such business; to make reasonable rules and regulations for the rendering of all services ordinarily appurtenant to such business; to cause the registration of all persons operating such business; to fix reasonable rates to be charged for service's rendered in such business; to hear and determine all controversies arising between persons operating such business and persons demanding such service or having a contract for receiving such service; to publish its findings and directions made in all such controversies and its reports on the conditions of such business, and to require security from the parties to such controversies for compliance with the commission's directions.*

Section 4. *In case of refusal or failure of any party to such controversy to comply with the commission's directions, the commission is authorized to bring proceedings in the Superior or County Court of the county in which the property, or any of it, is situated, to compel compliance with such directions; in which proceedings [etc., etc., being the standard provisions for judicial review of a commission's findings and directions].*

Section 5. *The commission is authorized to hire premises and to employ the necessary expert and clerical assistance for all investigations required in order to reach its determinations in such controversies and to make such reports, and is empowered to summon witnesses, direct the production of documents [etc., etc., being the standard provisions].*

Section 6. *The Housing Commission shall consist of one member from the state at large, to be chairman of the commission, and additional members from such counties as by vote at an election held in [date] may elect to come within the provisions and benefits of this act; one additional member being reckoned for each 500,000 or fraction thereof of population in each county so voting to come within this act. All members shall be appointed by the governor; but the members other than the chairman shall be residents of counties voting to come within the act, in the number respectively determined for each county by the foregoing method. They shall hold office for a period of two years from such election in each such county or until their successors are appointed, and may be reappointed. They shall receive a salary of [] dollars.*

Section 7. *The expenses of the commission, other than the salary of the chairman, shall be paid from the taxes collected in the several counties electing to come within the act, each county contributing a share of the total in proportion to the number of commissioners from that county. The salary of the chairman shall be paid from the state taxes collected.*

Section 8. *The sessions of the commission for the hearing of any controversy mentioned in Section 3 shall be open to the public; and the findings and directions in any such controversy shall be recorded.*

Section 9. *No fees shall be charged to any party for any proceedings had in any such controversy; except that a party or his representative or employee who is found to have wilfully done any act for the suppression of evidence or for the delaying of the investigation or for the obstruction of the commission or of any other*

party in the ascertainment of the facts, or for the deception of the commission or the contempt of its directions, may be required to pay all or a part of the expenses reasonably and actually incurred by the other party in the presentation of his case and also a reasonable sum representing the commission's expenses.

Section 10. The commission may make parties to any such controversy any lessor, lessee, agent, contractor, superintendent, janitor, or any other representative or employee of an owner, lessee, or lessor, if such person has actual control of the premises in controversy, or of the rendering of any services appurtenant thereto; and any direction of the commission shall be binding equally upon any such representative or employee or contractor.

Section 11. In the determination of any controversy the commission, while observing the fundamental principles of the existing law of landlord and tenant and the terms of any contract freely entered into by the parties, shall aim to give effect in their decisions to the principles of equity and fairness and to the reasonable customs and economic needs of the community, and seek to establish reasonable customs in the housing business.

Section 12. In determining the reasonableness of rates for housing services to be rendered for a future period in a given case, the commission may take into consideration any unconscionable profits received, or any unfair or injurious acts done, by one of the parties in a prior or pending contract or transaction between the same parties.

Section 13. The filing of any controversy before the commission shall not operate to stay any proceedings lawfully had before any court between the same parties. But in the determination of the controversy the commission may take into consideration the pendency or result of such proceedings in fixing the amount of its award or any other terms of the direction which it may make.

Section 14. This act shall cease to be in effect six months after this legislature shall declare that the business of housing is no longer affected by a public interest. As to any county electing to come within this act, the act shall cease to be in effect within three months after such county shall at an election have voted, by question duly submitted, to withdraw from the act.

But all contracts and directions made or issued while this act is in force shall continue binding for the period named in their terms, notwithstanding the act shall have ceased to be in effect before the expiration of that period.

Section 15. *The word person in this act includes a corporation, guardian, trustee, association, or other legal being having capacity to hold real estate.*

8. It is submitted that the foregoing measure is superior in the following respects:

- (1) It is *constitutional*, in that it rests on a well-approved legislative power;
- (2) It is *fair*, in that it imposes no arbitrary rule, but enables discrimination to be made between the grasping profiteer and the meritorious landlord;
- (3) It is *effective*, in that it uses a special commission to administer the law, instead of overcrowding the courts with tenancy-controversies;
- (4) It is *feasible* for any state, in that it applies only to those local communities which need and want it, and it thus saves others from having to share the burden of other people's troubles.

FAULT, RISK, AND APPORTIONMENT OF LOSS IN RESPONSIBILITY¹

BY RENÉ DEMOGUE

When, outside of any contract, a harm has been caused by one person to another, the most important question which arises for the jurist is to know in what cases reparation for it is due, under what conditions an indemnity may be demanded by the victim. Among these conditions one especially raises grave discussion. Beside the points assuredly difficult to answer when the psychological state of the author of the loss permits the making of him responsible and when there exists a causal relation between the act of this author and the harm sustained, we must, especially, ascertain whether one must be responsible only in case of fault committed, imprudence or negligence, or whether one must answer for every harm inflicted.

Historically, it is certain that primitive peoples in order to satisfy the sentiment of vengeance of the victim accorded him a satisfaction by the fact alone that his person or his goods had been materially harmed. But the law had soon commenced to evolve towards the idea which certain modern legislations, like the Code Napoléon, have clearly recognized—one is responsible only when one has committed a fault, that is to say, caused harm to another intentionally, through imprudence or through negligence.

Since then, up to a recent period, the jurisconsults of divers countries have agitated the question, if it would not be desirable to abandon the principle limiting responsibility to the case of fault, so that whoever creates a risk of damage answers for it. In order to know what is the solution on this point or the collection of solutions which it is suitable to recommend to legislators, it is necessary to state precisely the ground on which it is proper to stand, the ideas which may be adopted and the manner in which we may combine them harmoniously. This method the better permits of the extrication of the complex elements of the problem in the varied aspects which we are examining.

I

The doctrine of responsibility which demands fault in order that one may be obliged to pay indemnity has a close connection

1. [Translated from the French version by *Edward Matthews*.]

with the individualistic and liberal theories which have had so much success during a part of the 19th century. It considers that men are in principle independent of one another and that no one owes damages to others if he conducts himself with prudence. Each one definitely obtains the benefits which chance or his activity procure him; inversely he supports alone the losses resulting from the events of nature or from the deeds of other men. We admit only, so as to prevent awkward or malevolent acts, that the latter give rise to civil sanctions.

The partisans of new theories, of the theory of the risk, as they have frequently said, without expressing it formally, approach more closely the social point of view, which is the true angle at which the problem should be considered. When a harm sustained by a person is caused by the act of another, it is less a matter of determining whether the author of the harm shall answer for it than to know who will definitely support the material loss which has taken place. Will it be the author? Will it be the victim? It must always be that one of them or both at the same time bear it. What are the solutions best adapted to the divers social ends that we may follow in these matters?

We may be inspired especially by that need of security which is one of the most important with which the law should be pre-occupied. But at once a grave difficulty appears, for as soon as we wish to be precise, we find that there are here two conceptions of security, if not antinomial, at least sufficiently divergent. We may consider the desire of security of the author of a harm, or, on the contrary, place ourselves at the point of view of the victim. In face of the theory of responsibility the author of a harm feels himself in security only if he can reasonably hope to escape all responsibility by a middle course, that is to say, by abstaining from fraud or faults of a certain gravity. But to render him responsible for those venial faults which the greatest saint commits seven times a day, or with still more reason to charge him with the consequences of his simple act, is to rob him of all peace of mind. Preoccupation with the security of the author would then lead to a very narrow theory of civil responsibility. On the contrary, what is implied from necessity of security of the victim, what the holder of the damaged right demands is that the pecuniary value represented today by such or such interest be perpetuated in his hands under another form on the day when it will have been destroyed or injured by the act of man. Little matters it to him therefore that

the author of the act is a lunatic or a reasonable being, a person at fault or sheltered from all reproach, and if there is imprudence committed, whether it is grave or slight. He will demand therefore a broad theory of responsibility.

From these two points of view, however far enough apart from each other, a certain common idea nevertheless is revealed. For want of better, author and victim will demand as far as possible to be satisfied in advance on the extent of the losses the weight of which they will have to support. They will then be little favorable to very extensive powers given to the judge. Saving this common trait, it must be well recognized that there is opposition between the equally respectable desires of the author and the victim. Nevertheless this antagonism is not presented with the social character which theoretically we should be tempted to attribute to it. We would be forced to believe that the broadest theories of responsibility are the most favorable to the classes who are possessors, to whom they accord a certain perpetuation of their wealth. But that would be to forget that beside external wealth, there is the life of persons, their corporal integrity which constitute rights susceptible of being damaged and in some manner the necessary patrimony of even the poorest. And we have seen the labor classes strongly demand certain extensions of responsibility; notably in case of accidents of work and in case of accident caused by automobiles. On the contrary, the possessing classes have been less zealous in general in demanding extensions of responsibility. For they know that it is not sufficient to have an action against a responsible person. It is still necessary, in order that the action may be efficacious, that it be brought against a solvent person. If we place ourselves at the point of view of security, our problem then appears as putting in conflict the reasonable desires of the author and the victim, and, even on the social ground, as capable of bringing about a clash between the possessing classes and the less fortunate.

This conflict is not presented, however, at all periods with the acute character which it should have logically presented. As a psychological sentiment, the necessity of security, may, according to the times, be sharpened or attenuated. There are cataclysms of social life to which we accustom ourselves as to cataclysms of nature. A period of prolonged peace developing in us the need of security has been necessary so that the rulers in the course of the present war should think of formulating the principle of the right to reparation for losses of war. On the contrary, they did not

dream of indemnifying the victims of war in the centuries when the struggles against the foreign armies were frequent or permanent. It is for that very reason that, at the present period, every new mode of causing harm to others, ordinarily provokes as reaction, efforts to make him responsible, as a matter of right, who sets it in motion. Thus it is that the development of machinery has led to numerous laws making the master responsible for accidents of work happening to his personnel. In the same way the appearance of automobile vehicles has provoked in several states legislation extending responsibility, in case of accidents caused by the drivers of automobiles. Thus it is that through a psychological sentiment rather curious we complain above all of the evils to which we are not yet accustomed. We feel much less those to which the centuries have habituated us and which seem to us inseparable from existence. The legislator who has the sense of expediency must not neglect this general sentiment and he will act wisely by preoccupying himself especially with the new risks of accidents which scientific discoveries and industrial development may create. In spite of all, it is from the point of view of the security as well of the author as of the victim that the problem is the most difficult. Perhaps it is less so considered from a point of view more clearly social.

The principal aim of legislation concerning reparation of losses, is preventive. We may consider, not without reason, that the best civil legislation, like the best criminal legislation, is that which prevents harmful acts from becoming multiplied, for it has the important economic result of lessening considerable losses of the general wealth. This consideration permits quite naturally the justification of this principle: The responsibility of the entire loss must weigh on him, who, knowingly or maliciously, has committed a civil wrong. It justifies even a responsibility superior to the loss caused; I mean a condemnation to a private penalty. In order to prevent more surely the harmful act, especially if there is not involved a public penalty, it may be beneficial to condemn the delinquent to an increased indemnity, though it be in excess of the loss which it has produced. The preventive idea, which the civil law cannot set aside, leads equally to the statement that apart from all bad intention, he who has caused a loss must be responsible if a fault can be imputed to him. The reparation to which he will be condemned will incite him to be more circumspect in the future.

But here is presented a delicate question. Is there room to vary

responsibility according to the gravity of the fault? From the purely preventive point of view, it might be urged that slight faults being committed more easily, should be penalized at least as severely as grave faults. But, perhaps, it is more adapted to the ends pursued, to be more concerned with grave faults. It is not that the loss that they cause is always the greatest. A serious imprudence may have produced but slight material harm. Inversely, a very slight fault, as want of attention for a few seconds on the part of a driver of a vehicle, may have as consequence a mortal accident. But in preventing faults society may aim particularly to lessen the imprudences that are the least excusable, the slight faults being in some sort fatal. In all cases, this preventive point of view could only justify the responsibility of him who bears some reproach. It could not serve as a foundation for the theory of responsibility without fault.

On the economic ground, we may also set up other questions, no longer concerning the consumption of wealth, but its production. Does not too heavy a responsibility weigh on those who act, rendering them completely responsible for even their slightest faults, or even for their simple act, without any reproach being due them, of a nature to discourage activities? Would it not be necessary in consequence to show oneself unfavorable to any considerable extension of responsibility? The difficulty has been perceived by the partisans of the theory of risk, and Saleilles has answered it by saying that the certainty of being responsible could finally be supported more easily than the uncertainty resulting from a broad power given to the judge. The argument does not appear to us fully decisive; it is indeed to argue that the certainty of evil, that is to say, of responsibility, is better than the uncertain hope of escaping a judgment in damages. We believe that a system of civil responsibility even enlarged is compatible with the economic development of a nation, at the very least in a certain measure, but for another reason than that presented by Saleilles. If a person is devoted to an economic activity and he asserts, in order to escape the loss that he may cause, that this responsibility would be ruinous for it, he establishes thereby the fact that his activity is much less profitable to the whole of the country, since the benefit which he draws from it is not sufficient to compensate for the losses which it causes. That is particularly true in the case of a person who, in a continuous fashion, in virtue of professional occupations, devotes himself to one activity. From the general point of view, the activity is

profitable only if it compensates and beyond the destruction which it produces. This idea has evidently less force when it is a matter of an isolated act of activity, for every act carries certain chances of harm to others. If the risk is rather slight and remote, it would be regrettable that the activity of the author should be paralyzed. The idea would cease even completely to be true in the case where the author would be acting less in his own interest than for the general good. Thus is the case of a learned chemist who in order to make certain discoveries from which the national industry more than himself even will draw profits, devotes himself to experiments. If another person is wounded by an explosion which he has caused, it would be regrettable that the learned man acting in the general interest should support a loss in an enterprise of little profit to himself. Instead of approaching the question of responsibility from the purely economic side, we may consider it in an aspect more social by asking ourselves every time that a harm has been caused, as there is necessarily a loss which must be supported by some one, author or victim—which can the more easily bear the weight of it?

Here different ideas may enter into play. In the first place, why not make room for the idea, essentially practical, which is the basis of important theories like the philosophy of solidarity—that a loss is much more easily supported when in place of weighing on a single person, it is divided among several, or, better still, among a great number of persons. If instead of causing the entire loss to be borne by one of the parties involved, author or victim, we cause it to be borne by both at the same time, the burden will already become less. This very simple idea has the advantage of being utilizable so as to solve some of the most embarrassing cases: those where no fault can be imputed to one of the persons in question; those also where we can reproach either the author or the victim only with those very slight faults from which it is not possible to abstain completely.

We may say in support of this division of losses between the author and the victim that it is generally in harmony with the reality of the facts. When a harm results from the clash of the activity of two persons, it is frequent that each has through some slight fault remaining unknown contributed to its realization. To presume it outside of all proof is acceptable. For it is wise to presume what is the most frequent, rather than to erect as presumptions the exceptional cases. Such division of the loss moreover rectifies the part which chance may have in certain losses. In an obscure

street two individuals collide without perceiving each other; the first is robust, the second is an aged man walking with a tottering gait. It is probable that the latter will be thrown down rather than the other. Is it fully acceptable that he support alone the harm which may result from this accident whilst the first will bear no loss? It seems preferable to say that the harm resulting from the collision of these two activities should be divided among the two parties interested.

In a broader aspect, the division of responsibility is in harmony with the theories of social solidarity which for a quarter of a century have assumed great importance. It is considered as reasonable that in all social grouping, state, city, there is produced a certain pooling of misfortunes; the richest, those who are not directly struck, aiding the victims of misfortune. Why should not this solidarity exist in this limited grouping which the author and the victim constitute. It may be objected that solidarity is conceived in voluntary groupings, but not in those where the intention of the parties plays no role. A state, a city are only in a limited measure voluntary groupings. It suffices, in order that the principles of solidarity can be applied in a grouping that the members of the latter are conscious of a certain relation between them. That alone is sufficient for a division among the members of the group of a loss sustained by one of them.

This division of the loss between the author and the victim presents but one complication. If every unlawful harm is the occasion of an accounting between these two persons, do we not multiply law-suits? The objection is not decisive. For there may be amicable settlements. Moreover, it is not to be feared that law-suits may be much more numerous than today when questions of responsibility are one of the most frequent sources of litigation.

When we are preoccupied with determining who is responsible for a loss and who, author or victim, must support the loss which has taken place, we cannot when we examine who can in fact more easily support the burden set aside from consideration an institution so important in our modern civilizations—insurance. It is to be hoped when a loss has taken place that the weight of it finally will fall back on him who was best able to insure himself. In fact, as to him, he supports in reality no loss since he is covered by his insurer. On the other hand, the insurance company cannot complain of an obligation which is its reason for being and which it easily supports. If in fact it is a case of mutual insurance, the

indemnity paid will be finally supported by the body of the members. If it is a case of insurance at fixed premiums, it is again through the thousand channels of premiums paid by the insured members that the insurer will be reimbursed the sum which he has paid. In one case, as in the other, the losses are finally spread out—that is to say, rendered easy to bear. But which one, author or victim, is the best able to be insured, or more exactly, who are those who in fact, for divers reasons, are the most frequently insured? The question is rather delicate to solve since there is on one side insurance of things through which the proprietor of property is reimbursed for any evil that might reach it, fire, theft, etc., and, on the other hand, insurance of responsibility by means of which a person is protected against the actions in indemnity of which he might be the object. The first are taken over by the future victims, the second by the authors of the harm. It should therefore be hoped that in each case the legislator take into consideration the practice so as to establish in the cases difficult to solve who should be responsible.

The legislator may, moreover, be guided on these points by two remarks. In the first place, the persons belonging to the possessing classes are those who are insured the most. On the contrary, insurance, in many countries, is not held by the laboring classes. The worker is frequently careless of the next day. In spite of the quite individual interest which he might have to protect himself against risks which are for him particularly difficult to support, he is not insured or is but rarely insured.

Besides, those who by a regular activity and especially through a professional activity are the most liable to cause or to suffer a loss are the ones who are the most frequently insured. A head of an industrial establishment liable to cause accidents to his personnel through default of precautions will insure himself more frequently than a farmer who employs workers only exceptionally for the exploitation of his lands.

To render responsible him who has insured himself raises, however, an objection. Is that not to disfavor the most prudent, the one who has known how to foresee, and to favor the careless? It is exactly that. But it must be recognized that the unfavorable situation thus created for the most foreseeing will have only as consequence to make him definitely support the weight of the premiums of insurance which otherwise he has already voluntarily disbursed. The reasons which make us admit readily enough the responsibility

of him who is able to insure himself—that is to say, to cause finally the obligation of indemnity to be disseminated among a great number of persons—leads us to another consequence. Against the old theories which with difficulty admitted the responsibility of the state and of the public administrations, it is expedient, on the contrary, to proclaim without difficulty the responsibility of the moral persons of the public law. The treasury of the latter being principally fed by the tax—that is to say, by the payments of the whole of the citizens—the judgments pronounced against them will, in the last resort, be easily supported. We may then without objection, as the laws or jurisprudence of certain countries do in certain individual cases, admit the responsibility of the state itself aside from any fault on its part.

II

To what extent may we apply these general remarks, so as to construct a general theory having a sufficiently harmonious character?

A great distinction must in the first place be made between the cases where there exists to the charge of one of the parties concerned a fault of a certain importance and those in which this fault is not met. In the first case, the solution to be recommended from the legislative point of view is easy to determine if there has been bad intention. It is already accepted by positive law. If the author of harm has caused it in full knowledge of the case, whether he has acted solely through wickedness, pursuing the victim of his hatred, or that pursuing a different end he has foreseen the harm as certain, the solution forces itself on us. The author must be fully responsible for the loss which he has caused. Inversely, the victim will not be able to demand any indemnity if he has desired the damage in order to cause trouble to the author, or if he has accepted its idea through a desire of destruction which has seized his mind; for example, in the case where a workman in front of a wagon which is traveling on a road under normal conditions voluntarily abstains from turning out of the way. It is evident that social utility demands severity towards such acts. The voluntary destruction of wealth must be made more rare. The security which he whose voluntary act has caused the damage, may desire, cannot stand in the way of his full responsibility. Besides of what could he complain who has drawn from the voluntarily injurious act a pecuniary profit or the miserable moral profit of vengeance satisfied?

The severity with which we must treat such cases requires not only that the person responsible respond for all the loss which he has caused, but that, in the exceptional cases, where the profit drawn by the delinquent should exceed the loss caused, all the extra profits obtained be restored. Thus through his maneuvers, a manufacturer provokes a strike in a competing establishment and he profits from the circumstance in that he enjoys an actual monopoly to raise his prices. He should restore to the victim the supplementary profits which he has thus obtained. We can equally admit that, in certain cases to be determined, the indemnity to be paid the victim will exceed the damage and thus constitute a real private penalty. There are some hypotheses where in default of public penalty it is expedient for the sake of example to severely strike the voluntary author of an evil caused to others.

Much more numerous are the situations in which the author of a harm may see himself reproached not with a bad intention, but with an imprudence, a negligence. That is the classic case of the accident and one of the most numerous sources of law-suits. Here divers considerations, may enter into conflict. Society should desire to fight against faults. It should prevent them by establishing a civil penalty which it would be natural to vary according to the gravity of the fault. For, if it is natural to make the entire loss weigh on him who has committed a grave fault, a negligence which a person of average prudence would not have committed, it is no longer the same when the matter is one of slight fault. The latter may have caused a considerable pecuniary loss out of proportion to the sanction. From another side, the victim who has no fault wherewith to be reproached, may with reason demand a complete indemnification and plead that between him who has no reproach to make himself and the author who has committed an imprudence, even slight, the scales must rather incline to his side.

It seems to us that the conflict should be solved by a distinction which we have already suggested between faults exceeding what we may demand from an ordinary prudence and the less important faults. If we can impute to the author an important reproach we may without objection make him bear as penalty the entire loss. If on the contrary, he has only committed a negligence quite pardonable, we believe that another solution commends itself. We shall indicate it in an instant in treating the problem of responsibility without fault. The considerations which have served us hitherto have been exclusively drawn from the social interest which

there is in preventing the ill-intentioned or faulty acts. In view of the importance of the end to be attained we have not had to take account of the greater or less facility for one of the parties to support the damage. It is no longer quite the same, now that we arrive at the most delicate hypotheses; those where not even the slightest fault can be imputed either to the author or to the victim, or where these persons are at most guilty of slight faults. In such a case, there is room to establish a distinction between the losses which result from the employment of dangerous engines and those which are produced without this intervention.

The development of machinery and, in a more general manner, the increasing importance of the applied sciences have rendered more frequent certain installations, certain uses of substances, of engines, of motors which we could ill dispense with which increase the comfort or the conveniences of life and which have the common character of being dangerous. Not only do they demand certain precautions for their manipulation, but even when all measures of prudence at present known have been taken, accidents may still take place quite easily. It is sufficient to cite among these causes of damages, explosives, stationary inflammable liquids, motor machines, automobiles, gas, electricity, acetylene. When they appeared successively and when the diffusion of their employment revealed at the same time with their advantages the ill consequences which they could produce for others, it had been universally maintained that, in this case as in the others, the victim should prove that a fault was committed. Still, being vaguely conscious that this solution was not very satisfying, the tribunals have taxed their ingenuity to discover in the employer of the dangerous instrument a fault even slight so as to make it the basis of a responsibility. In an inverse sense, the partisans of the theory of risk have proposed that he who employs the dangerous instrumentality should be always responsible for the harm which he might cause. But the argumentation which has been presented to sustain this system appears rather weak. They are satisfied to say that the author and the victim, being both exempt from fault, the author should be responsible, for he is the cause; it is his act which has served as a pretext for the fatality. It is an argumentation rather materialistic which is content to trace back to the cause full responsibility for all the consequences. We believe that the problem is not to be solved in starting from the point of view that one may be responsible only if one has incurred some reproach and that the error of the preceding argumentation is in seeking a sort of fault in the sole fact of having caused the harm. Undoubtedly when a person decides to employ a dangerous engine,

this act of the will has been preceded by a period of reflection in which the possibility of loss could have been considered. But there is no reconciliation to make between the case where a fault has been committed by employing a thing without the desired precautions and that in which the usage of a dangerous engine is not connected with any imprudence.

We are nevertheless favorable to the responsibility, apart from all imprudence or negligence, of him who employs a dangerous engine. First and foremost, this person cannot complain of supporting the weight of the loss which he has caused. He utilizes this engine for a personal advantage, he cannot complain of suffering its ill consequences. He cannot object that this responsibility finally renders the employment of this engine onerous to him. Socially this employment is useful only if the profit which comes principally to him who utilizes the engine, exceeds the loss caused to others. An industrial establishment by its smoke, by the gases which it exhales, renders uninhabitable a neighboring house and thereby causes a depreciation in the value of the land of 50,000 francs. This factory economically is useful to the country only if the profits which are drawn from it permit of the payment without difficulty of the loss sustained by the neighboring proprietor. Undoubtedly exceptional cases may be shown where a factory working only with small returns may be of great benefit from the point of view of the city or the nation. Certain machinery is manufactured there for a neighboring port, an industry is exploited there which must not be allowed to fall into the hands of foreign manufacturers. But it is then to the authorities that the steps necessary that it do not operate at a loss belong. The manufacturer who in order to exploit his industry violates the rights of others and devotes himself to a real dispossession for cause of private utility must be responsible for that act. But it is especially by taking the point of view of the facility to support the loss, as the preceding idea already indicates, that we may discover grounds for the solution of our difficulty.

We may in the first place make this general remark that the instrumentalities which modern civilization has multiplied are generally costly. He who uses them is then often able to support the loss which they cause. Belonging to the possessing classes, it will more frequently happen that he is insured. The mechanism of insurances moreover often adapts itself better here to the insurance by the author of the harm than by the victim. In fact, when the holder of a right insures it against accidents which threaten it, insurance is not practiced as a general mode of perpetuating in a property its pecuniary value in spite of all perils which threaten it.

It functions only as security against a fixed category of accidents to the exclusion of others: fire, theft. More frequently, the insurances of responsibility permit him who makes use of a thing to arrange that the actions which will be brought against him will not be onerous to him. They have then a more general character. If, on the other hand, we consider him who makes use of the dangerous engine, which almost always has a permanent position, and him who fortuitously is its victim, we see that the first having his attention much more drawn to possible accidents will be more driven to protect himself with an insurance. He who makes use of gas will think more of insuring himself than the passer-by who walking alongside the property at the moment of the explosion suffers a physical harm.

If we thus admit the responsibility of him who utilizes the engine, we should nevertheless be forced to admit that the victim should bear a small fraction of responsibility. It is not necessary that a person be without interest to avoid a harm which can reach him. He must always be urged to show himself prudent on his side to avoid an accident which is always a destruction of wealth. What would the dangerous engines be whose use would thus involve full responsibility? It would be for the legislator to give the list of them. That would spare him, the principle being once stated, from being lost in every case of responsibility, in the complications of a special legislation.

Even without the employment of dangerous instrumentalities, an accident may happen without any fault on one side or the other. The classic theory of responsibility here refuses all indemnity to the victim. On the contrary, the partisans of responsibility without fault saying that it is sufficient that loss is caused, to owe an indemnity, admit there again full responsibility of the author. A solution of compromise, consisting of dividing the loss to be borne between the author and the victim seems preferable to us. We can no longer speak here of a machinery from which a profit is drawn, which justifies the full responsibility of the author. It should be remarked, moreover, that chance may have alone determined the party who stands the damage. In an obscure street two persons violently collide for want of having seen each other. Chance will often dispose that one person rather than the other is thrown down.

Divided responsibility causes each to have an interest in order to avoid harm, a part of the consequences of which he will bear. At the same time, in all the cases where the exact conditions, faulty or fortuitous, in which the harm produced cannot be determined, we arrive at an acceptable solution, as well for the author as

for the victim; the responsibility being divided between them will be more easy to support. In so far as the presumption controls, unless the victim proves that the case is one where the author is completely responsible, this solution is much more in accord than any other with the reality of the facts. If the exact conditions under which the harm has taken place have remained known, it is more reasonable to suppose that there has been some little fault on the part of each, rather than to think that the author has nothing wherewith to reproach himself.

This solution of compromise has such force that the tribunals recognize willingly enough that the author is in fault whilst estimating the indemnity sufficiently low, or they admit that the author and the victim are both faulty and divide the responsibility between them. The division of responsibility being thus the common law and having for basis not an idea of fault, but the facility with which the loss may be borne, this principle may receive a very broad application; it may be extended to the case where the author of the harm does not enjoy the plenitude of his mental faculties, being an insane person or a minor. We are indeed in the presence of one of those mitigated solutions which life, being unable to make ideal, readily accepts.

The division of losses in a given case will have to be made between the author and the victim as soon as an injury is sustained to the right of others; that is to say, an injury sustained to an interest which the victim might normally hope to be safeguarded, as a property right, corporal integrity. It should be otherwise in the case of a simple hope, as in an act of honest commercial competition. Little does it matter that the author has made use only of his right; while using it to the detriment of others, he commits an act from which socially it may be useful to infer an obligation of indemnity. There is nothing contradictory in admitting that the use of a certain right carries with it the obligation to repair in whole or in part the loss which results to others.

The only case where a person will not be able to have any recourse by reason of a loss which he has suffered is where he has been the victim of forces of nature. Then we may, although the solution is debatable, admit that there still will be irresponsibility if the actual author has been under a physical incapability of taking the precautions which he should have taken, or has been obliged to accomplish the prejudicial act. Here the individual has been but an instrument and there will be found beside him someone who will be made responsible: he who has forced him to act or who has hindered him from acting.

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EDITORIAL NOTE

UNIFORM STATE LAWS

The Thirtieth Annual Conference of Commissions on Uniform State Laws was held at St. Louis, August 19-23, 1920. Thirty-four jurisdictions were represented, including Illinois, whose entire commission, consisting of Ernst Freund, James M. Graham, Nathan William MacChesney, Joseph J. Thompson, and John H. Wigmore, were present.

The following drafts of acts were presented by the committees having these subjects in charge:

Seventh Tentative Draft of a Uniform Incorporation Act.
First Tentative Draft of a Uniform Declaratory Judgments Act.
Final Draft of a Uniform Act Concerning Depositions.
Final Draft of an Act Concerning Proof of Statutes of Other States.
Fourth Tentative Draft of Uniform Vital Statistics Act.
Fifth Tentative Draft of an Occupational Disease Act.

The acts on the first two subjects were, after discussion, referred to their respective committees for further consideration and report. The acts on the last four subjects were, after discussion and amendment, finally approved and recommended for adoption by the legislatures throughout the jurisdictions of the United States.

On the recommendation of the Committee on Prohibition, the second tentative draft of a Prohibition Act was not considered.

The Conference, on the recommendation of the Committee on Commercial Law, approved an amendment to section 26 of the Uniform Conditional Sales Act as follows:

SECTION 26. [Waiver of Statutory Protection.] No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement or statement by the buyer in such contract, shall constitute a valid waiver of the provisions of Sections 18, 19, 20, 21, and 25; except that the contract may stipulate that on such default of the buyer as is provided for in Section 16, the seller may rescind the conditional sale, either as to all the goods or as to any part thereof for which a specific price was fixed in the contract. If the contract thus provides for rescission, the seller at his option may retake such goods without complying with or being bound by the provisions of Sections 17 to 25 inclusive, as to the goods retaken, upon crediting the buyer with the full purchase price of those goods. So much of this credit as is necessary to cancel any indebtedness of the buyer to the seller shall be so applied, and the seller shall repay to the buyer on demand any surplus not so required.

In addition to the regular standing committees, viz., Executive, Legislative, Publicity, Appointment and Attendance of Commissioners, special committees were continued on the following subjects:

Commercial Law.
Marriage and Divorce.
Insurance.
Corporation Laws.
Registration of Title to Land.
Uniformity of Judicial Decisions.
Depositions and Proof of Statutes of Other States.
Automobile Legislation.
Occupational Diseases.
Co-operation with the American Institute of Criminal Law and Criminology.
Co-operation with the American Judicature Society.
Compacts and Agreements Between States.
Securing Compulsory Attendance of Non-resident Witnesses.
One Day's Rest in Seven.
Marking and Labeling.
Drug Law.

Declaratory Judgments.

Prohibition.

The special committees on the following subjects were discontinued:

Constitution and By-Laws.

Wills, Descent, and Distribution.

Conveyances.

Taxation.

Legislative Drafting.

Anti-Loan Shark Laws.

Purity of Articles of Commerce.

The following new committees were authorized:

Committee on Tribunal for Settling Industrial Disputes.

Committee on Status and Protection of Illegitimate Children.

Committee on Uniform Aviation Law.

Committee on Uniform Mortgage Law.

Committee on Uniform Primary Law for Federal Offices.

The Conference voted not to appoint committees to consider the following subjects: Uniform Law Prohibiting and Punishing Criminal Anarchy; Uniform Banking Law; Uniform Standard of Weights and Measures and Purity and Inspection; Uniform Law on Limitation of Liens and Mortgages; Uniform Law for the Standardization and Licensing of Engineers.

The following matters were referred to the Committee on Commercial Law: Uniform Blue Sky Law; Uniform Law on the Liability of Bankers with Respect to Checks drawn by Fiduciaries; the question of harmonizing the Sales Act, the Warehouse Receipts Act, the Bills of Lading Act, and the Stock Transfer Act with respect to the negotiability of documents of title.

There was referred to the Committee on Scope and Program the matter of a model law on Health Insurance; to the Committee on Marriage and Divorce, the question of an amendment to the Uniform Divorce Law as prepared by the National Divorce Congress in 1906 and approved by the Commissioners on Uniform State Laws in 1907.

At the 1919 Conference, a special committee was appointed on the subject of Obsolete and Superseded Acts, with authority to consider all the acts previously drafted and approved by the Conference, and to report such as were obsolete or superseded by later acts. The report of this committee was approved. A list of the Conference acts, revised to conform to the recommendations of this committee, is given at the end of this article.

The Committee also recommended that the act entitled "An Act to Establish a Law Uniform with the Laws of Other States for the Acknowledgment and Execution of Written Instruments," approved by the Conference at its meeting in 1892 and again in 1895, and the act entitled "An Act to Make Uniform the Law of Acknowledgments to Deeds or Other Instruments Taken Outside the United States," approved by the Conference at its meeting in 1914, be referred to the Executive Committee to consider and report

any needed changes or to report a consolidated act, as said committee may deem best. This recommendation was approved.

The Conference approved the principle reported by the Committee on Scope and Program, with respect to amendments to Uniform Acts, that no hard and fast rule should be adopted on the subject, but that each proposed amendment should stand on its own merits, and that the necessity for such an amendment must be clearly shown, and the proposed amendment first submitted to the Committee on Scope and Program for its consideration, reference and recommendation.

With the exception of the special committees on Uniform Drug Law, Compacts and Agreements Between States, Uniformity of Judicial Decisions, the special committees either made no reports or merely formal reports of progress. The Committee on a Uniform Drug Law made an extended report of its investigation of the subject referred to it. This report was referred to the incoming committee. The Committee on Compacts and Agreements between States made a brief oral report calling attention to the provision of the federal Constitution recognizing the power of the states with the consent of Congress to enter into compacts and agreements, and pointed out the possibility of utilizing such power in the interest of securing uniformity, and also in the interest of foreign commercial relations. The Committee on Uniformity of Judicial Decisions reported the completion and publication by Messrs. Baker, Voorhis & Co., of the book on Uniform State Laws, containing a list of all the Uniform Acts, fully annotated.

ACTS DRAFTED AND APPROVED BY THE CONFERENCE, WHICH HAVE BEEN DECLARED OBSOLETE OR SUPERSEDED¹

An Act Relating to the Sealing and Attestation of Deeds and Other Written Instruments; approved 1892. Obsolete.

An Act Relating to the Execution of Wills; approved 1892. Adopted in Massachusetts, Michigan, New York, Utah, Wisconsin, Alaska. Superseded by Uniform Foreign Executed Wills Act.

An Act Relative to the Probate in this State of Foreign Wills; adopted in Indiana, Iowa, Maine, Philippine Islands; approved 1892. Superseded by Uniform Foreign Probated Wills Act.

An Act as to Promissory Notes, Checks, Drafts, and Bills of Exchange (Days of Grace); approved 1892. Superseded by the Uniform Negotiable Instruments Act.

A Table of Weights and Measures; approved 1892. Obsolete.

An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Matrimony; approved 1900. Superseded in 1901 by the two following Acts:

An Act to Establish a Law Uniform with the Laws of Other States Relative to Migratory Divorce. Adopted in Wisconsin.

An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the

1. For the action of the Conference concerning the above acts see Proceedings, 1920; Proceedings, 1919, pages 71-74.

Bonds of Matrimony. Adopted in Delaware and Wisconsin.
 The last two acts are superseded by An Act Regulating
 Annulment of Marriage and Divorce, approved in 1907.
 An Act to Establish a Law Uniform with the Laws of Other States
 Relative to Insurance Policies; approved 1901. Obsolete.
 Compulsory Work Act; approved 1918. Obsolete.

UNIFORM ACTS DRAFTED AND APPROVED BY THE CONFERENCE, THE
 YEAR OF APPROVAL, AND THE NUMBER OF JURISDICTIONS
 ADOPTING EACH ACT

Name	Year of Approval	No. of Jurisdictions Enacting
Acknowledgments Act	1892	9
Acknowledgments Act, Foreign.....	1914	5
Bills of Lading Act.....	1909	23
Child Labor Act.....	1911	4
Cold Storage Act.....	1914	6
Conditional Sales Act.....	1918	6
Depositions Act	1920	..
Desertion and Non-Support Act.....	1910	12
Extradition of Persons of Unsound Mind.	1916	7
Flag Act	1917	6
Fraudulent Conveyance Act.....	1918	9
Land Registration Act.....	1916	3
Limited Partnership Act.....	1916	10
Marriage and Marriage License Act....	1911	2
Marriage Evasion Act.....	1912	5
Negotiable Instruments Act.....	1896	51
Occupational Diseases Act.....	1920	..
Partnership Act	1914	11
Proof of Statutes Act.....	1920	..
Sales Act	1906	23
Stock Transfer Act.....	1909	14
Vital Statistics Act.....	1920	..
Warehouse Receipts Act.....	1906	45
Wills, Foreign Executed, Act.....	1910	6
Wills, Foreign Probated, Act.....	1915	4
Workmen's Compensation Act.....	1914	3
Total—26		

ACTS DRAFTED BY OTHER ORGANIZATIONS AND APPROVED BY THE
 CONFERENCE

In addition to the acts included in the foregoing table, the following acts, drafted by other organizations, have been approved by the Conference:

An Act Regulating Annulment of Marriage and Divorce; approved in 1907; enacted in Delaware, New Jersey and Wisconsin.

An Act Providing for Return of Statistics Relating to Divorce Proceedings; approved in 1907.

An Act Providing for Return of Marriage Statistics; approved in 1907.

Federal Pure Food Law; approved in 1909; enacted in Kentucky and Louisiana.

Federal Pure Food Law Amendment; approved in 1913.

Standard Bill for Occupational Disease Reports; approved in 1914.

Standard Bill for Industrial Accident Reports; approved in 1914.

LIST OF STATES SHOWING UNIFORM ACTS ADOPTED THEREIN²

ALABAMA: Desertion and Non-Support Act (1915); Negotiable Instruments Act (1909); Warehouse Receipts Act (1915). Total, 3.

ARIZONA: Conditional Sales Act (1919); Flag Act (1919); Fraudulent Conveyance Act (1919); Negotiable Instruments Act (1913); Sales Act (1913). Total, 5.

ARKANSAS: Negotiable Instruments Act (1913); Warehouse Receipts Act (1915). Total, 2.

CALIFORNIA: Bills of Lading Act (1915); Negotiable Instruments Act (1917); Warehouse Receipts Act (1909). Total, 3.

COLORADO: Negotiable Instruments Act (1897); Warehouse Receipts Act (1911). Total, 2.

CONNECTICUT: Bills of Lading Act (1911); Negotiable Instruments Act (1897); Sales Act (1907); Stock Transfer Act (1917); Warehouse Receipts Act (1907). Total, 5.

DELAWARE: Conditional Sales Act (1919); Fraudulent Conveyance Act (1919); Negotiable Instruments Act (1911); Warehouse Receipts Act (1917). Total, 4.

FLORIDA: Negotiable Instruments Act (1897); Warehouse Receipts Act (1917). Total, 2.

GEORGIA: Land Registration Act (1917).* Total, 1.

IDAHO: Bills of Lading Act (1915); Limited Partnership Act (1919); Negotiable Instruments Act (1903); Partnership Act (1919); Sales Act (1919); Warehouse Receipts Act (1915); Workmen's Compensation Act (1917).* Total, 7.

ILLINOIS: Bills of Lading Act (1911); Cold Storage Act (1917); Extradition of Persons of Unsound Mind Act (1917); Foreign Probated Wills Act (1917); Limited Partnership Act (1917); Marriage Evasion Act (1915); Negotiable Instruments Act (1907); Partnership Act (1917); Sales Act (1915); Stock Transfer Act (1917); Warehouse Receipts Act (1907). Total, 11.

INDIANA: Negotiable Instruments Act (1913). Total, 1.

IOWA: Acknowledgments Act; Bills of Lading Act (1911); Limited Partnership Act (1919); Negotiable Instruments Act (1902); Sales Act (1919); Warehouse Receipts Act (1907). Total, 6.

KANSAS: Desertion and Non-Support Act (1911); Foreign Executed Wills Act (1911); Negotiable Instruments Act (1905); Warehouse Receipts Act (1909). Total, 4.

KENTUCKY: Child Labor Act (1914); Negotiable Instruments Act (1904). Total, 2.

LOUISIANA: Bills of Lading Act (1912); Extradition of Persons of Unsound Mind Act (1918); Flag Act (1918); Foreign Acknowl-

2. The star (*) indicates that the uniform act has been adopted with modifications.

- edgments Act (1916); Foreign Probated Wills Act (1916); Marriage Evasion Act (1914); Negotiable Instruments Act (1904); Stock Transfer Act (1910); Warehouse Receipts Act (1908). Total, 9.
- MAINE:** Bills of Lading Act (1917); Flag Act (1919); Negotiable Instruments Act (1917); Warehouse Receipts Act (1917). Total, 4.
- MARYLAND:** Bills of Lading Act (1910); Cold Storage Act (1916); Extradition of Persons of Unsound Mind Act (1918); Flag Act (1918); Foreign Acknowledgments Act (1916); Foreign Executed Wills Act (1914); Fraudulent Conveyance Act (1920); Limited Partnership Act (1918); Negotiable Instruments Act (1898); Partnership Act (1916); Sales Act (1910); Stock Transfer Act (1910); Warehouse Receipts Act (1910). Total, 13.
- MASSACHUSETTS:** Acknowledgments Act; Bills of Lading Act (1910); Child Labor Act (1913); Cold Storage Act (1912);* Desertion and Non-Support Act (1911); Extradition of Persons of Unsound Mind Act;* Marriage and Marriage License Act (1911);* Marriage Evasion Act (1913);* Negotiable Instruments Act (1898); Sales Act (1908); Stock Transfer Act (1910); Warehouse Receipts Act (1907). Total, 12.
- MICHIGAN:** Acknowledgments Act (1895); Bills of Lading Act (1911); Foreign Executed Wills Act (1911); Fraudulent Conveyance Act (1919); Negotiable Instruments Act (1905); Partnership Act (1917); Sales Act (1913); Stock Transfer Act (1913); Warehouse Receipts Act (1909). Total, 9.
- MINNESOTA:** Acknowledgments Act; Bills of Lading Act (1917); Limited Partnership Act (1919); Negotiable Instruments Act (1913); Sales Act (1917); Warehouse Receipts Act (1913). Total, 6.
- MISSISSIPPI:** Child Labor Act (1914);* Desertion and Non-Support Act (1920); Negotiable Instruments Act (1916); Sales Act (1908);* Warehouse Receipts Act (1920). Total, 5.
- MISSOURI:** Bills of Lading Act (1917); Negotiable Instruments Act (1905); Warehouse Receipts Act (1913). Total, 3.
- MONTANA:** Acknowledgments Act;* Negotiable Instruments Act (1903); Warehouse Receipts Act (1917). Total, 3.
- NEBRASKA:** Negotiable Instruments Act (1905); Warehouse Receipts Act (1909). Total, 2.
- NEVADA:** Extradition of Persons of Unsound Mind Act (1917); Foreign Acknowledgments Act (1917); Foreign Execution of Wills Act (1913); Foreign Probated Wills Act (1915); Negotiable Instruments Act (1907); Sales Act (1915); Warehouse Receipts Act (1913). Total, 7.
- NEW HAMPSHIRE:** Bills of Lading Act (1917); Foreign Acknowledgments Act (1917); Fraudulent Conveyance Act (1919); Negotiable Instruments Act (1909). Total, 4.
- NEW JERSEY:** Conditional Sales Act (1919); Fraudulent Conveyance Act (1919); Limited Partnership Act (1919); Negotiable Instruments Act (1902); Partnership Act (1919); Sales Act (1907); Stock Transfer Act (1916); Warehouse Receipts Act (1907). Total, 8.
- NEW MEXICO:** Acknowledgments Act; Negotiable Instruments Act (1907); Warehouse Receipts Act (1909). Total, 3.
- NEW YORK:** Bills of Lading Act (1911); Negotiable Instruments Act (1897); Partnership Act (1919); Sales Act (1911); Stock Transfer Act (1913); Warehouse Receipts Act (1907). Total, 6.

- NORTH CAROLINA:** Bills of Lading Act (1919); Negotiable Instruments Act (1899); Warehouse Receipts Act (1917). Total, 3.
- NORTH DAKOTA:** Acknowledgments Act;* Desertion and Non-Support Act (1911); Negotiable Instruments Act (1899); Sales Act (1917); Warehouse Receipts Act (1917). Total, 5.
- OHIO:** Bills of Lading Act (1911); Negotiable Instruments Act (1902); Sales Act (1908); Stock Transfer Act (1911); Warehouse Receipts Act (1908). Total, 5.
- OKLAHOMA:** Negotiable Instruments Act (1909). Total, 1.
- OREGON:** Negotiable Instruments Act (1899); Sales Act (1919); Warehouse Receipts Act (1913). Total, 3.
- PENNSYLVANIA:** Bills of Lading Act (1911); Limited Partnership Act (1917); Negotiable Instruments Act (1901); Partnership Act (1915); Sales Act (1915); Stock Transfer Act (1911); Warehouse Receipts Act (1909). Total, 7.
- PORTO RICO:** Warehouse Receipts Act (1919). Total, 1.
- RHODE ISLAND:** Bills of Lading Act (1914); Negotiable Instruments Act (1899); Sales Act (1908); Stock Transfer Act (1912); Warehouse Receipts Act (1908). Total, 5.
- SOUTH CAROLINA:** Negotiable Instruments Act (1914). Total, 1.
- SOUTH DAKOTA:** Conditional Sales Act (1919); Fraudulent Conveyance Act (1919); Negotiable Instruments Act (1913); Warehouse Receipts Act (1913). Total, 4.
- TENNESSEE:** Acknowledgments Act (1919); Cold Storage Act (1919); Desertion and Non-Support Act (1913); Extradition of Persons of Unsound Mind Act (1917); Fraudulent Conveyance Act (1919); Limited Partnership Act (1919); Negotiable Instruments Act (1899); Partnership Act (1917); Sales Act (1919); Stock Transfer Act (1917); Warehouse Receipts Act (1909). Total, 11.
- TEXAS:** Desertion and Non-Support Act (1913); Negotiable Instruments Act (1919); Warehouse Receipts Act (1919). Total, 3.
- UTAH:** Child Labor Act (1915);* Cold Storage Act (1917); Desertion and Non-Support Act (1915); Foreign Executed Wills Act (1907);* Land Registration Act (1917); Negotiable Instruments Act (1899); Sales Act (1917); Warehouse Receipts Act (1911). Total, 8.
- VERMONT:** Bills of Lading Act (1915); Desertion and Non-Support Act (1915); Marriage Evasion Act (1912); Negotiable Instruments Act (1912);* Warehouse Receipts Act (1912); Workmen's Compensation Act. Total, 6.
- VIRGINIA:** Land Registration Act (1916); Negotiable Instruments Act (1897); Warehouse Receipts Act (1908). Total, 3.
- WASHINGTON:** Bills of Lading Act (1915); Flag Act (1919); Negotiable Instruments Act (1899); Warehouse Receipts Act (1913). Total, 4.
- WEST VIRGINIA:** Desertion and Non-Support Act (1917); Negotiable Instruments Act (1907); Warehouse Receipts Act (1917). Total, 3.
- WISCONSIN:** Bills of Lading Act (1917); Cold Storage Act (1917); Conditional Sales Act (1919); Desertion and Non-Support Act (1911); Extradition of Persons of Unsound Mind Act (1919); Flag Act (1919); Foreign Acknowledgments Act (1915); Foreign Probated Wills Act (1915); Fraudulent Conveyance Act (1919); Limited Partnership Act (1919); Marriage and Marriage License Act (1917); Marriage Evasion Act (1915); Negotiable Instruments Act (1899); Partnership Act (1915); Sales Act (1911); Stock Transfer Act (1913); Warehouse Receipts Act (1909). Total, 17.

- WYOMING:** Desertion and Non-Support Act (1915); Negotiable Instruments Act (1905); Partnership Act (1917); Sales Act (1917); Warehouse Receipts Act (1917). Total, 5.
- ALASKA:** Acknowledgments Act (1915); Bills of Lading Act (1913); Conditional Sales Act (1919); Foreign Executed Wills Act (1913); Limited Partnership Act (1917); Negotiable Instruments Act (1913); Partnership Act (1917); Sales Act (1913); Stock Transfer Act (1913); Warehouse Receipts Act (1913). Total, 10.
- HAWAII:** Negotiable Instruments Act (1907); Workmen's Compensation Act. Total, 2.
- DISTRICT OF COLUMBIA:** Negotiable Instruments Act (1899); Warehouse Receipts Act (1910). Total, 2.
- PHILIPPINE ISLANDS:** Bills of Lading Act; Negotiable Instruments Act (1911); Warehouse Receipts Act (1912). Total, 3.

LIST OF ACTS, SHOWING THE STATES WHEREIN ADOPTED³

- ACKNOWLEDGMENT ACT:** Iowa, Massachusetts, Michigan, Minnesota, *Montana, New Mexico, *North Dakota, Tennessee, Alaska. Total, 9.
- ACKNOWLEDGMENTS, FOREIGN ACT:** Louisiana, Maryland, Nevada, New Hampshire, Wisconsin. Total, 5.
- BILLS OF LADING ACT:** California, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Alaska, Philippine Islands. Total, 23.
- CHILD LABOR ACT:** Kentucky, Massachusetts, *Mississippi, *Utah. Total, 4.
- COLD STORAGE ACT:** Illinois, Maryland, *Massachusetts, Tennessee, Utah, Wisconsin. Total, 6.
- CONDITIONAL SALES ACT:** Arizona, Delaware, New Jersey, South Dakota, Wisconsin, Alaska. Total, 6.
- DESERTION AND NON-SUPPORT ACT:** Alabama, Kansas, North Dakota, Massachusetts, Mississippi, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming. Total, 12.
- EXTRADITION OF PERSONS OF UNSOUND MIND ACT:** Illinois, Louisiana, Maryland, Massachusetts, Nevada, Tennessee, Wisconsin. Total, 7.
- FLAG ACT:** Arizona, Louisiana, Maine, Maryland, Washington, Wisconsin. Total, 6.
- FRAUDULENT CONVEYANCE ACT:** Arizona, Delaware, Maryland, Michigan, New Hampshire, New Jersey, South Dakota, Tennessee, Wisconsin. Total, 9.
- LAND REGISTRATION ACT:** *Georgia, Utah, Virginia. Total, 3.
- LIMITED PARTNERSHIP ACT:** Idaho, Illinois, Iowa, Maryland, Minnesota, New Jersey, Pennsylvania, Tennessee, Wisconsin, Alaska. Total, 10.
- MARRIAGE AND MARRIAGE LICENSE ACT:** *Massachusetts, Wisconsin. Total, 2.
- MARRIAGE EVASION ACT:** Illinois, Louisiana, *Massachusetts, Vermont, Wisconsin. Total, 5.

3. The star (*) indicates that the uniform act was adopted with modifications.

NEGOTIABLE INSTRUMENTS ACT: Adopted in all jurisdictions except Georgia and Porto Rico; adopted with modifications in Vermont. Total, 51.

PARTNERSHIP ACT: Idaho, Illinois, Maryland, Michigan, New Jersey, New York, Pennsylvania, Tennessee, Wisconsin, Wyoming, Alaska. Total, 11.

SALES ACT: Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, *Mississippi, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin, Wyoming, Alaska. Total, 23.

STOCK TRANSFER ACT: Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Wisconsin, Alaska. Total, 14.

WAREHOUSE RECEIPTS ACT: Adopted in all jurisdictions except Arizona, Georgia, Indiana, Kentucky, New Hampshire, Oklahoma, South Carolina, Hawaii. Total, 45.

WILLS, FOREIGN EXECUTED, ACT: Kansas, Maryland, Michigan, Nevada, *Utah, Alaska. Total, 6.

WILLS, FOREIGN PROBATED, ACT: Illinois, Louisiana, Nevada, Wisconsin. Total, 4.

WORKMEN'S COMPENSATION ACT: Idaho, Vermont, Hawaii. Total, 3.

University of Wisconsin.

EUGENE A. GILMORE.

COMMENT ON RECENT CASES

CONSTITUTIONAL LAW—EVIDENCE OBTAINED BY UNLAWFUL SEARCH OR SEIZURE.—*Weeks v. U. S.*, 232 U. S. 383, 34, Sup. 341, in 1914, certainly threw a heavy explosive shell into the camp of the defenders of honest law and order as unexpectedly and disturbingly as did Germany on August 2, of that same year, when it broke over the borders of little Belgium.

The situation is this: Many of the parasites who make a dishonest living with an infinite variety of "get-rich-quick" schemes commit the major part of their offense in printed or written books and documents. The canny bankrupt, the fake promoter, the shoddy investment shark, the anarchist propagator, the fraudulent advertiser, the circulator of obscene literature—these parasites of civilization must virtually be caught "with the goods on them," if at all; i. e., a main part of the proof of the case against them is their possession of the illegal documents. Hence, it is usually necessary to search their premises and impound the documents there found, so as to preserve them for proof in court. Otherwise, the proof at the trial is "napoo."

Now this search and seizure can usually be done lawfully by warrant. But sometimes it is done without a warrant, for various reasons, of course, more or less untenable; but when you are trying to protect the community against moral rats, you sometimes get to thinking more of your trap's effectiveness than of its lawful construction.

However, there is a deep-rooted principle of the law of evidence, bed-rocked on unqualified precedents of two centuries, that good evidence is not inadmissible merely because it was unlawfully obtained. So the principle saved the situation.

But in 1885, the Federal Supreme Court rapped, and in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. 524, declared that as an indirect consequence of the Fourth Amendment, prohibiting unreasonable search and seizure, evidence obtained by unlawful search and seizure was not admissible. This at the time was the only decision of its sort. Twenty years later, in *Adams v. New York*, 192 U. S. 585, 24 Sup. 372 (1904), the federal Supreme Court awoke from its nap, and squarely reversed itself. This left the situation once more normal and healthy.

But in another decade, in *Weeks v. U. S.*, supra, in 1914, the court had a fit of sentimentality, and, in an opinion which must have been hailed with glee by the parasites of all species, excluded such evidence; this time on the distinction that where the accused had applied before trial for return of the documents illegally impounded and this had been judicially refused, the illegality would in such case be penalized by excluding the evidence at the trial. This ruling, of course, gave a cue to the parasites' lawyers,

and since *Weeks v. U. S.* they have usually been careful to lay that foundation of moving before trial for a return of the documents. In the interval, the lower federal courts having been endeavoring to work out the effect of the new distinction in *Weeks v. U. S.*; but their efforts have been hampered by the element of uncertainty as to what new turn will be given to the doctrine by the Supreme Court when it next handles the question, or when the next parasite cares to spend enough ill-gotten money on litigation-costs to push his case to the top.

In the meantime (and this is the timeliness of our comment) the veteran Judge Hough in *U. S. v. Maresca*, Southern District of New York, 266 Fed. 713, 718 (1920), places on record an opinion notable for its sane attempt to stop the exuberant efforts of the parasites' lawyers to interpret *Weeks v. U. S.* as a charter of freedom. "Since *Weeks v. U. S.*," he says—

"it seems to be thought that if the prosecutor is found in possession of any documents, especially of evidential value, that belonged to an accused, a motion to get them back should prevail, apparently because the U. S. attorney ought to be prevented from using the papers in violation of the Fifth Amendment. I am not advised of any holding to that effect. The only ground on which this or any similar motion can rest is that the prosecutor's possession is the result of an unreasonable search and seizure (Fourth Amendment) or of a deprivation of property without due process of law (Fifth Amendment). This must always, and here does, present a question of fact."

J. H. W.

STREETS AND HIGHWAYS—VACATION.—The case of *Tri-City Artificial Ice Co. v. Day*, 292 Ill. 550, 127 N. E. 106, is interesting almost to the point of uniqueness in the contention there made relative to the effect to be given to a certain instrument of vacation there involved. That instrument purported to be in exercise of the power given by section 6 of Chapter 109 of the statutes, and to vacate all of the plat "including" a certain street, naming it. The case arose upon the contention of one of the litigants that such a vacation instrument operated to exclude from its operation all streets other than the one thus expressly referred to. Such construction the court, obviously, could not accede to, for, while the law permitted vacation of less than the whole plat, whether the instrument accomplished the one or the other, was a matter of intention, and it would seem that an expression of an intention to vacate the whole or entire plat, is sufficiently indicative of an intention to vacate all the streets within it, as well.

But the court, it seems, relies somewhat upon the point that the instrument by its terms purports to be of an exercise of the power given by section 6 of the act, and would seem to argue that this item, alone, is effective to accomplish a vacation of the entire plat, all streets and alleys included, because under section 6 the whole plat, and not only part of it, must be vacated; section 7 being the provision under which one must proceed to vacate less than the whole

plat. And in this position of the court attention is directed to the text of section 7. So far as it is important it is as follows:

"Any part of a plat may be vacated in the manner provided in the preceding section and subject to the conditions therein prescribed."

Thus, by reference, section 6 furnishes all the steps necessary to be observed in vacating streets, whether of all the streets in a plat or of one street only.

It is true that section 6 provides for vacating a whole plat of a subdivision; which means all the streets in the subdivision, and that section 7 applies to the vacation of one street, or of less than all the streets in that subdivision; but the operation of the latter section is solely by reference to section 6.

As applied to the facts in the principal case, it would seem, except for the fact that the vacation instrument in terms purported to be a vacation of the whole plat, merely referring to the instrument as being in exercise of the power given by section 6, would not, alone, call for an effect of it as a vacation of all the streets and alleys in the plat.

Contrast with the situation in the principal case, the holding in cases involving acceptance by a municipality of streets dedicated by plat of subdivision, where there has been actual acceptance by the authorities, of part only of the streets therein dedicated. Reference is had to the language in *Dewey v. City of Chicago*, 274 Ill. 268-274, in epitome of the rule:

"It is now the well established rule in this state, that where the city accepts the most important streets of an addition and the major portion of them, and has evinced no intention to refuse to accept any of them, it will be deemed to have accepted all."

The situations bear no analogy to each other, the former being purely statutory and the latter as purely common law, and they are offered here merely in contrast.

It should be observed, also, that the sections of the statute above referred to does not apply to streets except as created by plat. For the rules involved in vacation of streets in situations not embraced within the sections above considered, reference is made to the comment in ILLINOIS LAW REVIEW XIII, 648. E. M. L.

INTERSTATE COMMERCE—WHAT IS WITHIN THE STATUTE—TRANSMISSION OF TELEGRAM THROUGH ANOTHER STATE TO A POINT IN THE STATE OF ORIGIN.—Out of the multitude of cases of conflict between the state and federal authorities in which the Supreme Court of the United States has asserted the supremacy of the federal law, it is rare to find one, where the unprejudiced reader, conversant with the principles involved, cannot easily concur. *Western Union Telegraph Co. v. Speight*, U. S. Adv. Ops. '20-'21, p. 5, is one of the exceptions.

No appearance or briefs were filed for the defendant in error. The real question involved was whether a telegram sent from one point to another within the state of North Carolina, but transmitted by the telegraph company through another state, was an

interstate transaction within the Interstate Commerce Act, and so, whether the state law, which allowed damages for mental suffering alone, or the federal law which did not, applied. It is easy to approve of the policy of the federal law, which is thoroughly consistent with the present tendency to promote efficient service by stabilizing the risks as well as the rewards of the carrier. It must be admitted also that the carriage was interstate: *Hanley v. Kansas City Southern Railway Co.*, 187 U. S. 617; *Kirmeyer v. Kansas*, 236 U. S. 568, 572. But while the latter fact would prevent regulation, or the imposing of any unreasonable burden by the state, the commerce clause, alone, has never been held to imply the creation of a federal common law as to the measure of damages to be applied by a state court in a common law action for breach of the carrier's duty. So that, while the opinion of Mr. Justice Holmes does not say so in terms, it must be implied that the transaction fell within the Interstate Commerce Act, from which would be implied the application of the law as interpreted by federal courts: *Postal Telegraph Cable Co. v. Warren Godwin Lumber Co.*, 251 U. S. 27; *Western Union Telegraph Co. v. Boegli Co.*, 251 U. S. 315; *Croninger v. Adams Express Co.*, 226 U. S. 491; *Boston & Maine R. R. Co. v. B. Hocker*, 233 U. S. 98.

Heretofore, wherever a measure of liability has been implied because of the policy of the Interstate Commerce Act, the shipper has voluntarily participated in an interstate transaction. In the present case there was no direct evidence of any knowledge or consent by the sender of the message, and the test laid down by the state Supreme Court for determining whether the action of the court below in setting aside a verdict for the plaintiff for mental suffering alone was correct, was:

"It is not a question of motive, nor of what method the defendant prefers to do its business, nor of red tape, but simply a question of fact whether the initial and terminal points are in this state, and whether there is a direct telegraph line between the two points, in good condition and in use, over which the message can be transmitted without passing through another state. If so, it is an intra-state message, whether it is actually sent through another state or not."

Again—

"Whether commerce between two points in the same state is intra-state depends primarily upon whether both termini are in this state, and the only exception is, when it is necessary to cross through the territory of another state in passing from the initial point in this state to the terminal point, also in this state."

This the federal court says: "is not the law," and so we must take it for granted that it is not, although we may be uncertain why it is not. If an interstate transaction were reasonably necessary, then the implication of authority from the sender of the message would follow. But if an interstate transaction were not necessary, then the question of whether the liability shall be that of an intra-state or interstate carrier depends purely upon the option of the carrier. And this, technically, the Supreme Court recognizes, for

it says (after holding that the motive to evade the jurisdiction of this state would not have made the business intrastate)—

"If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intra-state transaction that never took place, but for the unwarranted conduct and the resulting loss."

By which, then, we may imply that the circumstances recited by the court, that the route taken had been customary for years, and that "the course adopted was more convenient and less expensive for the company," left no issue of unreasonableness, but that if the conduct of the telegraph company in sending the message over the interstate route had been unreasonable and unnecessary, no recovery could have been had for mental damages because of the mistake in the message itself, but that a recovery could have been had for the loss of the right to recover mental damages in an action for misconduct in making the transaction an interstate one instead of intrastate. Such refinements are not consistent with the method of looking through the forms to the substance heretofore adopted by the Supreme Court in passing upon interstate commerce questions. See also *Ill. Cen. R. Co. v. Henderson Elevat. Co.*, 226 U. S. 441.

It is regrettable that the Supreme Court had not the benefit of a two-sided argument, and necessarily there is some doubt as to the weight to be attached to this decision upon the ex parte hearing in this case.

C. B. E.

COVENANTS RUNNING WITH THE LAND—CONSTRUCTION—DOMINANT AND SERVIENT ESTATE.—In the case of *Wise v. Wouters*, 288 Ill. 29-33, 123 N. E. 35, a lodge; the owner of two lots, numbers 5 and 6, conveyed lot 5, "except the south 10 feet thereof" with the provisions:

"said first party agrees that it will keep the south ten feet of lot 5, except the west 25 feet thereof, as an open unobstructed passageway or private alley in connection with a lodge hall hereafter to be constructed, and said passageway or private alley shall be kept and maintained as such, as required by the ordinance of Chicago, for hall and amusement purposes."

Subsequently the lodge decided not to build on the other lot and conveyed it and the south 10 feet of lot 5, to Alma F. Wise, that deed containing this provision:

"The south ten feet of lot 5 is hereby granted with a covenant running with the land that the said grantee will keep the south ten feet of lot 5, except the west twenty-five feet thereof, as an open, unobstructed passageway or private alley, subject to the conditions relating to said south ten feet of lot 5 contained in the deed from said Woodlawn Park Lodge No. 825. Independent Order of Odd Fellows of Illinois, to Jennie Wouters."

The court construed both deeds together and from them considered that the covenant was not alone in favor of the grantor, but was in fact in favor of the grantee of lot 5, arriving at this conclusion from that language, but the court says that even if the

language were not clear, the surrounding facts and circumstances make it clear. For those surrounding facts and circumstances the court refers to the negotiations between the grantor and the grantee of lot 5 before the conveyance and the insistence of the grantee upon such an alleyway as essential to the use intended to be made by the grantee of the premises; also the circumstance that after the conveyance of lot 6 and the ten-foot strip both parties used the alley for vehicles to pass to and from the street to the rear of the premises.

It is believed that two considerations must have entered into the formulation of this decision. First: What dominant estate was this covenant to serve? And second: Can a grantor designate for the dominant estate property other than that which he owns? As applied to the facts in this case the pertinence of these inquiries must appear thus: First, the query was directed to whether the covenant was for the benefit of the lodge and its contemplated use of the property, or for the benefit of the lot first conveyed, viz., lot 5; and second, inasmuch as the second deed was necessary to enable the court to arrive at the decision that the covenant was in favor of lot 5, which was first conveyed, whether or not, the circumstance of that lot being then in the hands of one other than the grantor and grantee in second deed, could prevent lot 5 from benefiting by that second covenant.

Upon the first of these inquiries the cases presenting the closest analogy are those where property is subdivided and the question is whether a covenant is for the benefit of each lot or for the benefit of property retained by the original grantor. The cases say that it is a question of intention and involves the identity of the dominant estate. If the grantor retains property in the subdivision, the presumption is the covenant is intended for the benefit of the part retained by him and not for the benefit of the parts conveyed: *Hutchinson v. Ulrich*, 145 Ill. 336; *Clark v. McGee*, 59 Ill. 518; *Simpson v. Mikelson*, 196 Ill. 575; *Druecker v. McLaughlin*, 235 Ill. 373; *Wiegman v. Kusel*, 270 Ill. 526.

Possibly if there had been no other covenant than the one in the first conveyance, the court would have concluded that the covenant was for the benefit of lot 6, though why the grantor should covenant to keep open a strip of lot 5, expressly retained by him, for the benefit of lot 6, retained by him, doubtless, would inject sufficient ambiguity into that provision to admit proof of surrounding circumstances, and that, it would seem is what the court had in mind in the expression in its opinion as to the surrounding facts and circumstances clarifying the language.

Relative to the second inquiry, it seems that the dominant estate need not be other property owned by the covenantee, so long as it is related property (*Hayes v. St. Paul Methodist Ep. Church*, 196 Ill. 633) and that would make applicable the covenant in the second deed. Might it not be said that in this regard the principal case states affirmatively what the *Hayes* case sets up only negatively?

E. M. L.

RECENT CASES

CONTRACTS—INTERSTATE COMMERCE—LIABILITY OF RAILROADS TO BE SUED WHEN UNDER GOVERNMENT CONTROL.—The case of *Hines, Director General of Railroads et al. v. Henaghen et al.*, 265 Fed. 831, deals with a contract under which a railroad company built a side track for the use of a large shipper at the latter's expense. The contract contained a clause authorizing the company to discontinue its use, and remove the track if, in its opinion, it "is not justified in continuing said side track because it will interfere with the proper operation of said railroad." The court held that this clause did not authorize the railroad to arbitrarily refuse to receive shipments where there is no evidence tending to show that continuance of the side track would in fact interfere with the proper operation of the railroad, and that the shipper may have an opportunity to secure judicial determination as to the reasonableness or unreasonableness of such refusal. In other words, the court held that, although the contract expressly gave the railroad the right to refuse, if in its opinion the continuance interfered with its proper operation, still its opinion of such interference would have no weight unless it was reasonable.

The court held further that although this question involved interstate commerce, still the Interstate Commerce Commission was not the proper body to determine the reasonableness of the railroad's refusal to receive shipments, but that the matter came within the jurisdiction of the federal courts. It also held that the taking over by the President of a railroad under his constitutional war-time powers does not exempt the management from such a suit as in the principal case.

CORPORATIONS—SEALS—CONSTRUCTION OF INTENTION OF LEGISLATURE.—Section 4 of the General Corporation Act of Illinois requires that the statement of incorporation shall be sealed. The case of *The People v. Ford*, 294 Ill. 319, 128 N. E. 479, presented the following situation:

Three men, in incorporating a company, signed the statement, but neglected the seal required by the statute. The attorney general filed an information in the nature of a quo warranto, calling upon the directors to show by what authority they exercised the privileges of that office.

The court in construing the statute held that the provision regarding seals was merely directory, and not mandatory, and that a departure from the course laid down in the General Corporation Act does not prevent a corporation from becoming one, de jure, where the provision violated was, in effect, directory. It is necessary to quote from the opinion to show the court's method of reasoning to find the requirement of a seal to be directory:

"The requirement of a seal in the execution of documents by indi-

viduals has become a mere formality and means nothing." . . . "The solemnity of the sealed instrument is purely Pickwickian and no longer represents an idea." . . . "It would not be carrying out the intention of the legislature to hold that the addition of a scrawl by the signers of the statement is mandatory and its omission invalidates the incorporation."

These passages would seem to indicate that the effectiveness of the seal has passed, and those of the profession who oppose formalism will doubtless welcome the freedom of the court in construing the statute, and its attitude toward a relic that no longer has a real place in the law.

The dissent of Justice Farmer takes the position that since the legislature saw fit to make the requirement, the courts cannot disregard it on the ground that it was a useless requirement, or that the legislature did not mean what it said.

DELEGATION OF LEGISLATIVE POWER.—The sovereign power of making laws, requiring the exercise of discretion and judgment, is vested in the legislature, and cannot be delegated. But the legislature can, for the purpose of efficient execution of the laws, confer upon individuals or commissions authority to carry out the provisions of the law. Whether the authority given by any particular statute is a delegation of the power to make the laws, or only a discretion in the execution thereof has been a source of controversy in the courts of Illinois as well as the other jurisdictions as long as our government has existed.

In the recent case of *People v. Sholem*, 294 Ill. 204, 128 N. E. 377, an act creating the office of State Fire Marshal was in question. Section 9 provided in substance that whenever the fire marshal or his deputies and assistants—

"find any building, or other structure which, for want of proper repair or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and which is so situated as to endanger other buildings or property, or so occupied that fire would endanger persons or property therein or . . . find upon any premises combustible or explosive material or inflammable conditions . . . they shall order the same to be removed or remedied and such order shall be forthwith complied with by the owner or occupant of said buildings or premises," and then gives a right of appeal to the State Fire Marshal, and, if the order is not revoked, a penalty of from \$10.00 to \$50.00 a day for each day's neglect can be imposed, for which a suit may be brought in the name of the people in any court of record, or before any justice of the peace with right of appeal.

Four of the seven judges sitting held that this part of the act was unconstitutional in that it gave the fire marshal arbitrary discretion as to what was a "building liable for any cause to fire" and as to what order could be made with respect thereto, and that the reasonableness of the decisions of the fire marshal could not be reviewed in the suit for the penalty, but only the question of the owner's compliance with the order. Three dissenting judges held that it was within the police power of the legislature to protect

against the calamities of fire and that since it could not define the exact condition which would render a building dangerous, the initial determination had to be left to an administrative official with his decision to be reviewed by the court in the suit for the penalty, contending that the act intended such a determination.

The foundation case on this subject is *People v. Reynolds*, 5 Gilm. 1, where it was held that to establish the principle that whatever the legislature may do, it shall do in every detail or else it shall go undone, would almost be to destroy the government, and while the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet could not advantageously, do itself, and that without this power legislation would tend to become both oppressive and ridiculous.

Following out this principle are many cases in point, such as the following holdings: That an ordinance giving the commissioner of public works authority to approve a device to prevent the spilling of oil on streets was constitutional;¹ an ordinance requiring the owners of certain buildings to install automatic sprinklers with the provision for the approval of plans for the installation by the Chief of the Bureau of Fire Prevention does not give arbitrary power to that officer who has authority only to approve the plan and not to say what system shall be installed;² an act which gives discretion to an inspector as to the number, location, material, and construction of fire escapes was not a delegation of legislative power because the legislature has done all it could do to define the law, and its execution from the nature of the case would have to be placed in some individual or board;³ an ordinance prohibiting the exhibition of motion pictures which are immoral and obscene is not invalid because it leaves to the chief of police the initial determination of the question of whether pictures are immoral and obscene and there is nothing in the ordinance to prevent resort to the courts to compel the chief of police to issue a permit for a picture which is not in fact obscene;⁴ an ordinance that no parades shall be allowed upon the streets without a permit from the police under a penalty is a violation of the constitution upon the ground that it leaves to the caprice of the police what is a lawful or unlawful parade;⁵ a statute with a proviso making it discretionary with the fire marshal of the state to place in the class of unexempted buildings those that are otherwise exempt if certain conditions are present is void as an unlawful delegation of legislative power because it is within the discretion of the marshal to exempt any particular building of the same class;⁶ and lastly, a statute which provided that the county superintendent shall determine what is to constitute a satisfactory and efficient high school

1. *Spiegler v. City of Chicago*, 216 Ill. 14, 74 N. E. 718.
2. *City of Chicago v. Washington Home*, 289 Ill. 206, 124 N. E. 416.
3. *Arms v. Ayers*, 192 Ill. 601, 61 N. E. 851.
4. *Block v. City of Chicago*, 239 Ill. 251, 87 N. E. 1011.
5. *City of Chicago v. Trotter*, 26 N. E. 359.
6. *Sheldon v. Hoyne*, 261 Ill. 222, 103 N. E. 1021.

district without designating the requisites of such a district was bad as giving to the superintendent a discretion as what the law should be.⁷

The majority of the court in the principal case recognized the doctrine of *People v. Reynolds*, supra, and expressly followed the construction placed upon that principle by the cases cited, but held that in the case before them the legislature had given too much power to the fire marshal. If the reason for that decision was that the act did not give the courts supervisory power over any arbitrary action by the marshal the court was wrong because the principle that courts should do all they can to uphold the constitutionality of statutes and the precedent established by *Block v. City of Chicago*, supra, demand that where there is nothing in the act to prevent such a supervision, the court should construe it as giving the control. Moreover, if the court decided the case on the ground that the legislature had delegated its power to make the laws, it did not have to go into the possibility of control over the marshal by the courts, since the initial determination must be whether it has done so. Upon the latter question, it is submitted that the statute in controversy sufficiently satisfied the acknowledged rule that the legislature may delegate to a ministerial officer a discretion in the execution of the laws as long as it controls his actions by specific rules so far as it is advantageously possible so to do.

INSURANCE—MUTUAL COMPANIES—WHEN AN APPLICATION FOR INSURANCE BECOMES EFFECTIVE.—One Palmer had a policy of automobile insurance with the Bull Dog Automobile Insurance Association, a mutual company, which operated on a system of membership fees and assessments, in the case of loss, to be borne on a pro rata basis by all members. The policy contained a provision to the effect that where a member sold his automobile and acquired a new one, he must give notice to the attorney in fact, enclosing a fee, "when a contract will be issued to cover the new automobile as fully as was the old . . . provided such new automobile is acceptable to the attorney in fact."

On August 7, 1917, Palmer sent the company a notice of change, together with the fee, and complied with the policy in all other ways. That evening his new automobile was stolen. The next day the attorney in fact accepted the change and mailed a rider to the old policy to Palmer which was in effect a policy upon the new car; and at the same time Palmer mailed the attorney in fact notice of the theft. On this set of facts, the company refused to pay and the question was decided in *Palmer v. Bull Dog Insurance Association*, 294 Ill. 287, 128 N. E. 499.

The court held that a policy of renewal is a new contract of insurance, and that a car which is stolen before an application is approved is not insured, as the policy does not relate back to the time the application was mailed. If the policy was still in effect, the old car was insured and it was not the old car that was stolen.

7. *Kenyon v. Moore*, 287 Ill. 233, 122 N. E. 548.

The court was very clear in its statement of the law on transfers of policies, and the effect of applications for same, and this decision for the insurance company should be decisive on this point. In its opinion the court laid no emphasis on the fact that the company was a "mutual," and it is to be gathered from the language that the result would have been the same had the company been a "stock" company. Insurance law has become such a specialized field of contract law that it is a relief to find the court applying contract rules strictly to insurance policies, as was the case here.

LIBEL—PUBLICATION—PRIVILEGE.—In the case of *Globe Furniture Co. v. Wright*, 265 Fed. 873, the court considered the question of whether a letter written by a defendant, charging that the plaintiff's receipts for payments made to the defendant had been tampered with and raised, was actionable as being libelous, when such letter was shown to the defendant's bookkeeper and collector, and was dictated to a stenographer. The court, in holding that such a letter is not actionable, refused to base its holding upon the ground that the bookkeeper, collector, and stenographer were, because of their identity of interest with the writer, or because of the relationship of agency, or of master and servant, in no sense third persons, and that hence there was no true publication and hence no cause of action. The ground for the court's holding was that the publication was made to persons owing a duty to the writer in respect to the letter; that this duty formed the basis for a conditional privilege; that the letter came within the privilege; that on account of such privilege the law withdraws the inference of malice which would ordinarily arise; and that therefore the letter was not in the nature of a libel, and actionable as such.

MONOPOLIES—UNLAWFUL INTERFERENCE WITH INTERSTATE TRADE IN MAGAZINES—ACTION IN WAR BY STATE COUNCIL OF DEFENSE NOT ACTION BY GOVERNOR.—During the hostilities of the present war, the Council of Defense of the State of New Mexico became convinced that William R. Hearst was un-American, anti-British, and pro-German in his sympathies, and that he was promoting active propaganda of that character in his newspapers. Moved by the conviction that the circulation in New Mexico of the Hearst newspapers and magazines would tend to give aid and comfort to the enemy, and that the sale and reading of the magazines would contribute to Mr. Hearst's success in spreading such propaganda, the Council issued editorial warnings in the War News to advise the people concerning the danger. After the New York American struck the prayer for victory in the war from the President's Memorial Day Proclamation, the Council appealed to all the people of the state to stop buying and reading and the news dealers to stop selling the Hearst publications. This was approved by the governor of the state, and the Council proceeded to destroy Mr. Hearst's business in New Mexico. To prevent this, the cor-

poration publishing the magazines prayed for an injunction. The Circuit Court of Appeals, Eighth Circuit, in *Council of Defense v International Magazine Co.*, 267 Federal Reporter 390, upheld the issuance of the injunction granted by the trial court. In so defending the business of the Hearst publications, the court declared that no magazines were free from unpatriotic matter. The court further declared that the state Council had by its action exceeded its statutory powers, and that the acts of the Council of Defense amounted to a conspiracy to boycott or blacklist the Hearst magazines, such a conspiracy being an interference with interstate commerce prohibited by the Sherman Act.

The court also held that the approval by the governor of the action by the State Council of Defense did not amount to action by the governor, and, by so holding, defeated the attempt to justify the action under the special war powers of the chief executive. The court also distinguished between the cleanliness of the hands of the complainant magazine corporation and the condition of the hands of its majority stockholder.

INTOXICATING LIQUORS—PROVISIONS OF EIGHTEENTH AMENDMENT CONTRARY TO FIFTH AMENDMENT GOVERN CONFISCATION OF PROPERTY—LIBERAL CONSTRUCTION OF VOLSTEAD ACT PREVENTS REMOVAL OF WHISKY FOR PERSONAL CONSUMPTION.—Corneli desired to obtain one barrel of whisky, purchased by him in the spring of 1917 and contained in a bonded warehouse, and to transport the same to his residence for his own use. To effect that removal he brought a bill in equity against a collector of internal revenue. The U. S. District Court (E. D. Missouri) in *Corneli v. Moore*, 267 Federal Reporter 457, decided against such removal of the whisky in question. The court thereby averted a flood of 60,000,000 gallons of liquor over a dry country (the amount is that of which judicial notice was taken by the court). In this case the court held that whisky was property prior to the passage of the Eighteenth Amendment and that a statute which restricted the use and possession of personal property owned by the citizen is in effect a confiscation of property in violation of the Fifth Amendment, but the court, however, declared the transportation of the liquor to be contrary to the necessary liberal construction of section 3 of title 2 of the Volstead Act and held that provision to be constitutional under the Eighteenth Amendment. This amendment, having been adopted subsequent to the Fifth Amendment, was held to control, the court declaring itself to be in no position to relieve the diminution of personal liberty effected by the recent change in our organic law.

By way of dictum the court recognized the right of transportation of liquor from one bona fide residence to another.

REAL PROPERTY—LIMITATIONS—NECESSITY OF MENTAL ELEMENT AS AFFECTING RUNNING OF STATUTE.—The more or less historic conflict as to the necessity of the element of "intent to claim adversely" to the true owner of realty (arising originally in the two leading and conflicting cases of *French v. Pearce*, 8 Conn. 439 (1831), and *Grube v. Wells* (1871), 34 Ia. 148) was considered in a recent case, *Cassidy v. Lenahan*, 294 Ill. 503, and the majority rule, based upon the doctrine of *French v. Pearce*, supra, was affirmed as the law of Illinois.

In this case, Braverman, owner of fee in lot No. 9, claimed title by adverse possession of a strip $4\frac{1}{2}$ feet wide of the west part of lot 8 abutting thereon. This strip had been occupied by his predecessors in title and by himself, when in 1885, through mistake as to lot line between 8 and 9 a $1\frac{1}{2}$ -story wooden house built on lot 9 encroached 2 feet on lot 8 and a wooden sidewalk running along east side of house, and built the same year, encroached another $2\frac{1}{2}$ feet on lot 8. Owners of lot 9 had paid taxes only on lot 9 and had never claimed the strip in controversy. This suit, to clear title, was started in 1917 and the chancellor found that Braverman and others in priority of estate and possession with him had been in exclusive, open, notorious, actual, adverse, visible, continued and uninterrupted possession for more than the statutory period and decreed title in him. From this decree Mrs. Cassidy appealed. The Supreme Court affirmed this decree, Cartwright, C. J., saying in the course of his opinion on the necessity of intent—

"The fact that there was a mistake as to the boundary line between lots 8 and 9 and the owners of lot 9 took possession of the portion of lot 8 believing it to be on lot 9 and that they had no intention of taking any part of lot 8 did not affect the operation of the statute" (citing *Daily v. Boudrean*, 23 Ill. 228; *Grumm v. Murphy*, 110 Ill. 271).

THE VOLSTEAD ACT—CONSTRUCTION OF THE PROVISIONS AS TO STORING.—The case of *Street v. Lincoln Safe Dep. Co.*, 41 Sup. Ct. Rep. 31, involved a decision on the provisions of the Volstead Act. Plaintiff had stored with the defendant, a warehousing company, some intoxicating liquors which had been acquired before the passage of the Eighteenth Amendment. Following threats of confiscation by the Commissioner of Internal Revenue, the plaintiff prayed an injunction restraining the defendants from interfering with his possession of the room in the warehouse and from removing and disposing of the liquors.

A question presented, therefore, was whether a warehousing corporation may lawfully permit to be installed in its warehouse, after the effective date of the Volstead Act, liquors lawfully acquired before that date which are stored there in good faith to protect them and preserve them until they shall be consumed by the owner and his family or bona fide guests. The court held that such a storing was lawful and reversed a decree of the District Court sustaining a motion to dismiss. The court considered in its opinion the effect of section 21, which declares that "any room—

or place where intoxicating liquor is manufactured, or kept, or bartered . . . is hereby declared to be a common nuisance." The holding was that the word "kept" in this section is obviously inapplicable to this case both in common reason and by virtue of the words with which it is directly associated. Section 3, which forbids the transportation of liquor except as authorized by the Act, was held as irrelevant to the case because of the obvious purpose of the Eighteenth Amendment which was to prohibit the sale or transportation of liquor, but not its personal use.

It was admitted that there is an administrative power under the Act to so regulate the transfer of such liquor from the warehouse to the dwelling of the owner as to prevent an invasion of the Act, but even with this premise the court could find nothing in the Act to render such a custody, as is here in question, unlawful. The contention of the defendant that Section 33 of the Act to the effect that possession of liquor is *prima facie* evidence that such liquor is being kept for the purpose of being sold, exchanged, etc., in violation of the provisions of the Act, was met by the evidence in the principal case that the liquor was not being kept for such purpose, but was being held solely for private consumption. This decision, both in its dicta and in its logical results, is conclusive as to the fact that the Volstead Act is not aimed at personal consumption of liquor by the owner, his family, or his bona fide guests.

DIVERSITIES DE LA LEY

QUOTING HERBERT SPENCER IN A JUDICIAL OPINION.—“Unless philosophers become kings, or kings philosophers,” said Socrates, “the state will be poorly governed.” And the same interchange of personalities between judges and philosophers may be equally invoked for the improvement of justice. Otherwise, why produce the “Modern Legal Philosophy Series”?

Quoting a philosopher does not make one a philosopher. Nevertheless the judicial quotation of a philosopher is at least strong circumstantial evidence that the quoter is disposed to let in the light of philosophy upon the chambers of the law. When judges shall have ranged thus freely in their reading, and shall support their legal conclusions by sandwiching the philosophers in orthodox array between Starkie's and Meeson and Welsby's reports, the cause of philosophy may cheer up.

“‘Povera vai e nuda, Filosofia,
Dice la turba al vil guadagno intesa;
‘Pochi compagni avrai nel altra via.’”

said Petrarch, lamenting the darkness just before the dawn of the days when the Humanists were to humanize both law and literature, and to oust Bartolus in favor of Alciat. And so let the legal Petrarchs now cheer up.

All this apropos of Presiding Justice Jenks' boldness in recently quoting Herbert Spencer (*Doyle v. Clauss*, 180 New York Suppl. 671), in an ordinary libel case:

“The well-being of each rises and falls with the well-being of all.” (*Data of Ethics*, p. 241.)

J. H. W.

A CONTINENTAL DÉCISION—REGRESS OF A SURETY WITHOUT CESSION OF CLAIM—COMPENSATIO.—[*Entscheidungen des Reichsgerichts*. Erster Band: 1880. No. 124.] The plaintiff brought suit on a claim assigned to the plaintiff by her husband. The assignment was made on September 16, 1876, and the defendant was notified three days later. The defendant made the following defense of set-off:

He alleged that the husband of the plaintiff was indebted to the merchant M upon a loan; that the brother of the defendant had become surety for the debt to the extent of five hundred dollars; that the defendant before the assignment of the claim sued upon became surety to the said merchant M of his brother's obligation of suretyship; and that upon the insolvency of the plaintiff's husband and after the bankruptcy of the principal surety in May, 1877, the defendant paid the debt secured together with interest.

The defendant sought to set off the sum paid.

The plaintiff denied that the defendant had acquired a claim against her husband, especially since an assignment to the defendant was not alleged. She also denied that the claim, if any, could be set off.

The first judge rejected the defense since it was not competent for the defendant in paying M to charge the plaintiff with the transactions of her husband when the defendant was not connected with these transactions as a surety. The payment of the debt of another person lacks the necessary connection.

The appellate court judge affirmed the judgment with approval of the grounds. Upon the complaint of nullity of the defendant the second decision must be set aside, but the judgment itself in substance must stand.

The conclusions show that the basis of the judgment is not clearly stated. It does not establish that the defendant succeeded to the suretyship 'in rem suam' or 'donandi causa.' It is said—

"The question whether the surety has regress against the principal debtor must be determined from the legal relations which existed between them. The rule is that a surety who has paid the creditor, even though there has been no assignment of the claim, may require indemnification from the principal debtor in accordance with the principles of mandate or agency: Inst. 3, 20, 6 (de fidejussoribus; D. 3, 5, 43 (de neg. gest.).

"The only exception to the rule is where the surety has undertaken to act 'in rem suam' or 'donandi animo.' That the claim for regress is to be decided on these principles is shown alike by doctrine and practice: cf. Windscheid, "Pand." II, §481; Arndts, "Pand." §356; Sintenis, "Pand." §129; Stobbe, "Deut. Privatrecht" III, §192; Seuffert, Archiv XXII, No. 237 (Munich), XVII, No. 40 (Rostock).

"The secondary surety acquires the same rights against the principal debtor as the primary surety would obtain, when he releases the principal debtor by satisfaction of the creditor."

Since in this case the appellate court judge did not determine that the defendant had intervened for the husband of the plaintiff 'donandi causa' or 'in rem suam,' he violated the principle of law formulated in the complaint of nullity, in denying regress on the ground that the payment of the debt to M was not 'utiliter gestum' in favor of the principal debtor. Therefore the decision with respect to the defense of set-off is invalid.

But the second decision must be sustained.

The rule of the common law is that the 'debitor cessus' may have 'compensatio' against the assignee of claims against the assignor if such claims existed at the time of the assignment, and that if the claim assigned is due the claims to be set off shall also be due: cf. Krug, "Kompens.," pp. 170 sq.; Dernburg, "Kompens.," p. 386; Seuffert, Archiv. II, No. 279 (Lübeck), VI, No. 177 (Stuttgart), XII, No. 18 (Cassel), XIII, No. 91 (Celle), XIV, No. 22 (Jena); Fenner and Mecke, IV, p. 32.

In this case, the husband of the plaintiff assigned to the plaintiff a certain building loan claim on September 16, 1876. The defendant was notified a few days later. He did not make the payment

to M until 1877. According to the above rule, the defendant could only urge 'compensatio' if he had a claim against the husband of the plaintiff at the time of the notice of the assignment. He supposed that having already assumed the secondary obligation of suretyship before the notice of assignment, he could set it off when he made payment. This is incorrect. The common law practice denies even to the primary surety the power of set-off if he pays after notice (Seuffert, Archiv, II, No. 279 (Lübeck), XIII, No. 91 (Celle)), although by the undertaking of suretyship he acquires a right of security or exoneration against the principal debtor, but not to payment: D. 17, 1, 45, 2 (mandati); Girtaner, "Bürgschaft," p. 529. In this case, the payment to M and not the assumption of secondary obligation of suretyship by the defendant for his brother was a 'utiliter gestum' for the plaintiff's husband; but at the time of the payment the claim had already been assigned.

PREVARICATION PROCEDURE.—A unique law custom prevails among the Tangkhul Naga of the State of Manipur in Assam, according to Rev. William Pettigrew, a Baptist missionary who has spent the past thirty years of his life working with this head-hunting tribe, under the auspices of the American Baptist Foreign Mission Society. The tribe knows so little of truth-telling that court cases usually resolve themselves into a contest of prevaricators, he says. When judges are unable to decide between rival liars, the diving test is applied. "Plaintiff and defendant, with the entire court at their heels, adjourn to the nearest stream," Mr. Pettigrew explains. "The plaintiff and defendant must then dive under the water. The one who remains under for the longest time wins the case."

Rev. Mr. Pettigrew has reduced the language of the Tangkhul Naga into writing, translated several books, including text-books, and eight chapters of the New Testament, introduced tea, soap, and potatoes to them, and taken the only census ever made of the tribe.

LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION.—193. *Question:* In the opinion of the committee is it professionally improper for an attorney to accept from an absent person, who expects to be made a defendant in a divorce action in a foreign jurisdiction, where the plaintiff has acquired domicile, a power of attorney in advance of the institution of the action, to admit service upon the attorney within the jurisdiction of process in the action and to appear as attorney in behalf of the defendant and to file proper answer in his behalf?

Would the answer to the inquiry be different if the power of attorney were executed before the acquisition of the domicile, but in the expectation that in course of time it would be acquired and the action instituted? Would it be different if it were executed after both the acquisition of domicile and the institution of the action?

Answer: The committee sees in the question no intimation of unlawful collusion, though it is aware that what amounts to such collusion as a question of law varies in different states.

Assuming, as it does, that the suggested course is for the protection of an absent person's rights (as indicated in the question), the committee sees no impropriety in the acceptance by the attorney of the retainer and power to perform his duty under its terms. In its opinion, the time of such retainer and of the granting of such power, whether before or after acquisition of domicile or institution of the action, does not necessarily imply unlawful collusion; but it recognizes that it may be considered by the court in determining whether the action is or is not collusive in fact.

194. *Question:* A title company is requested by an attorney, on behalf of a co-operative apartment corporation in which he is interested, to examine the title to real estate and to issue its policy. The bill of the title company is rendered to the corporation, and the latter, knowing that the attorney will be allowed a commission by the title company, requests that the attorney turn over to it any commission he may be entitled to from the title company. As the attorney is a stockholder in the co-operative apartment corporation, he makes no charge to it for his services.

Certain title companies in New York allow a commission of 25 per cent of their fees to attorneys, who in behalf of their clients place business with the title companies in the examination and insurance of titles. The title company in question states that this commission is allowed to attorneys by the title companies owing to the fact that they would be able to make their own searches, but in no case is it ever allowed to a layman.

In the opinion of the committee would it be proper for the attorney to comply with the request of the co-operative apartment corporation?

Answer: In answering previous questions the committee has heretofore in substance expressed the opinion that in somewhat similar cases receipt by the lawyer from persons serving the legal profession, of any part of their compensation for work or services performed in litigation or in other matters in which the client is interested, the knowledge and consent of the client is requisite where such receipt is otherwise not improper; and that lawyers should not voluntarily put themselves into positions where the conditions of their compensation may interfere with the full discharge of their duty to their clients (Questions 111, 124, 166).

In the committee's opinion the lawyer in this case may properly comply with his client's request.

In giving the foregoing response the committee has not overlooked the possible implication that the allowance by the title company is conditioned upon its retention by the lawyer for his personal use. The committee, however, is still of the opinion that the acceptance of such a condition is the client's and not the lawyer's privilege, and if the lawyer believes that the title company would

not acquiesce in this disposition of the allowance, he should, to avoid deception, specifically inform the title company.

195. *Question:* In the opinion of the committee is there any impropriety in a lawyer, who has made a specialty of income tax matters, advertising a card in daily and trade papers in the following form:

JOHN SMITH
INCOME TAX CONSULTANT
(Address)

Answer: In the opinion of the committee there is no impropriety in the publication of the card, nor in its omission to state that the advertiser is a lawyer. The committee regards such publication as a matter of personal taste. (See Answer No. 1.)

196. *Question:* An attorney negotiates an agreement of settlement of pending litigation for an absent client, and thus obtains knowledge of the existence and whereabouts of the fund to be paid in settlement to his client. The payment of the fund to the client is conditioned upon the execution and delivery of a general release by the client. Client owes the attorney another bill for other professional services. May the attorney, without violation of any principle of professional propriety, secure a warrant of attachment to be levied against the fund upon learning that in order to avoid the payment to the attorney of the bill for other professional services the client is transmitting the general release through other channels so as to secure and remove the fund from the jurisdiction without paying the bill for other professional services.

Answer: In the opinion of the committee there is no professional impropriety in the course suggested; the knowledge of the fund does not appear to have originated in a confidential communication from the client. (The committee distinguishes the question from Question No. 44 where it considered that the attorney could not under circumstances there stated, properly avail himself of confidential information received from the client.)

CRIMINAL PLEADING—ASSAULT WITH INTENT—FATUOUS TECHNICALITIES.—Mr. Raymond Fosdick's recent book on "American Police Systems" is full of wisdom as well as of facts. Conceding the unpleasant facts about the police defects and abuses and crudities in our cities, he warns us that after all our failure in police is partly connected with our failure in criminal law and procedure. Up above the police, the courts on their legal throne contribute to the result, and in particular, by their persistent obstruction through their devotion to barren technicalities.

Here is the latest sample of this fatuity: *Anderson v. Crawford*, 8th C. C. A., 265 Fed. 504 (1920); habeas corpus to discharge C. from confinement in the penitentiary under a court-martial sentence of Feb. 4, 1917. The charge was "assault and battery with intent to kill"; specification one was that C. "did feloniously assault W. by cutting him with a knife with intent to kill"; specification two was that C. "did feloniously assault W. by shooting at him with a

pistol with intent to kill." The findings were, guilty of specification one, except as to "intent to kill"; guilty of specification two; and guilty of the charge. Now Art. 58 of the Articles of War (as in force at the time) which enumerates a list of offenses, mentions "*assault and battery with an intent to kill*," and it was argued that mere "*assault with intent to kill*" was not made punishable; and that since under specification one, "*assault by cutting*" the accused was found not to have the intent to kill, and under specification two he was found guilty of only "*assault by shooting at W.*" though with intent to kill, the conviction of assault *and battery* was void; though the finding was guilty on the general charge of assault and battery with intent to kill. This point the court sustained, per Munger, J., and discharged the defendant; Lewis, J., dissenting.

No matter here about the reasoning pro and con. The reasoning of Lewis, J., approving the conviction, is sound enough, but the reasoning put forth by the majority can also be followed, in mere point of logical subtlety.

But the general fact staring out from the case is that our criminal law is being administered by the courts up in a sky-parlor of logical quiddities which have nothing to do directly with either justice or efficiency. Read again Aristophanes' play of the Birds, and amuse yourself with his satiric description of Cloud-Cuckoo-Land. It was written for twenty-five centuries ago, but it fits our courts of today. They twitter away seriously with their pretty logical antiphonies; but their twitterings do not have any genuine relation to the seething affairs of mankind below on the earth of reality.

When the legalistic minds of the lawyers on the criminal bench substitute for legalism some standards of justice or efficiency, or both, we shall have a respectable system of criminal justice; but not before.

J. H. W.

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This book is at least interesting in the particular that evidently it was 'born with a gold spoon in its mouth.' Like those to whom such advantage is usually accredited, it is not destined to make its way on its own resources. The author can afford to publish it, and he has done so. But not even the memorable name of the family to which the author belongs can make the book other than it is. And it is this: Merely the publication by a living lawyer of his many occasional speeches, his reports and papers as a member of an army draft board, and his contributions to a newspaper, the latter productions enthusiastically endorsing the proposed League of Nations while that famous proposal was of early impression. All these may be, and no doubt are, out of a proper pride, interesting to the author, his immediate friends and family; but, while they are good, they are nevertheless so commonplace, and in a sense so personal, as not to appeal to the general reading public; no, not even to those of the legal profession. For while the title of the book accredits them to an *American Lawyer*, yet there are many American lawyers, even outside the city of New York.

The introduction is too long, too rambling, and, in fact, too inferentially recommendatory to lead one to read further, unless, as we have done, for the purpose of review.

Seldom has a publication of the personal import that attaches to this one appeared in our literature during the lifetime of the author of the speeches and papers. Those that have appeared, by the lapse of time create interest as we now observe them on the bargain counter of the second-hand bookseller. We purchase that we may read and feel the throb of bygone days. The present publication will no doubt so appeal in the future to the schoolboy now, the man then.

Washington, D. C.

IRA E. ROBINSON.

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FAMILIES OF LANGUAGE AND FAMILIES OF LAW

BY C. VAN VOLLENHOVEN

I

In making use of the expression "language family" in my title I do not intend to stray beyond my limits, but in the first place to make clear what is here meant by "law families"—in biology, for instance, the word "family" is often used in a different sense—and, further, through the parallel of a study, which is far in advance of the similar study of law, to be able to demonstrate a few differences and a few similarities.

If I may use the word "law family" as a pendant to that of "language family," then the large law *family* (in one large law district) is split into law *tribes* (each in its own law region) which in their turn may be divided into *circle* laws (each in its own law circle), below which are found only parish laws, law dialects. In this way we may imagine an Indo-Celtic or Indo-Germanic law family¹ containing a Germanic law tribe, and within that again, an early Dutch circle law, or again, an Austronesian or a Madagassy-Polynesian law family, an Indonesian law tribe, and a Bali circle law.

The problem that is covered by this method of expression hardly needs to be explained. Those who, being familiar with modern Dutch law, apply themselves to that of France, Switzerland, or Austria, will find their path smooth enough, while, on the other hand, for the study of English-American law, a knowledge of Dutch law may occasion pitfalls. Those who understand Germanic law and examine Indonesian law will certainly come upon difficul-

1. *Sumner Maine*, "Early History of Institutions"² (1880), pp. 20-21, 96.

ties, but those who are impregnated with Roman law and take up this same Indonesian law, will not be able to make anything of it at all. And without doubt the same sort of relationships and diversities will be found between Japanese, Anglo-Indian, Russian, and Semitic law.

Now, however, we encounter at once a marked difference between law and language. The differences in law are in appearance much more superficial than those of language. If I do not understand Hungarian or Chinese, these languages are gibberish to me. But if I know nothing about Hungarian or Chinese law, still I shall find in them much that is not altogether unfamiliar to me. To speak of an Indonesian language is nonsense; to speak of Indonesian law is justifiable. In the eighteenth century, the Europeans in Sumatra genuinely believed that the inhabitants of the island "speak languages radically and essentially different,"² and this opinion is still found amongst laymen in the Netherlands Indies; but these same people are inclined to think that its law is "*comme chez nous*." On this account, therefore, the task of comparative law study (thesmography and thesmology) is totally different from that of comparative study of language. Both aim at drawing up a historical-geographical scheme of development, but the methods are very different. The genealogical study of law, on the other hand, is on the lookout for the possibility of combination, delves for relationships, degree, and kind of affinity, builds its genealogy up from below. It has to contend against those who will not believe that the Sanscrit "*cakra*" (*chakra*) and our "wheel," or the Persian "*gurga*" and our "wolf" correspond sound for sound with one another—how can they, when the words do not resemble each other in the least? The genealogical study of law, on the other hand, is on the lookout for the possibility of delimitation; its contest is against those who say that the main principles of law are about the same over the whole world, and that the Indonesian and the Dutch law relating to landed property, for instance, do not essentially differ from one another.

This is the reason of the different way in which the two sciences go to work. Comparative philology is glad if it can obtain a survey, a general view, a preliminary exploration, which reveals that there is more similarity than one would think. For law comparisons there are, on the contrary, few things so dangerous as a general rough view of this kind, which recognizes laws of revenge, of inheritance, and marriage settlements everywhere, and

2. Marsden, in *Achaeologia*, (1782) VI, p. 154.

lays an undesirable stress upon similarities thus found. In the universal law explorations by the German ethnological law school,³ the law circles embrace in no way distinct law groups, but, at the most, different stages of one practically identical process of law growth; in the hodge-podge of Kohler's contributions to the series *Allgemeine Rechtsgeschichte*⁴ this whole question is as little recognized as it was in the law comparisons of Sir William Jones in the eighteenth century.⁵

II

What is the way, then, to attack this difficult question of demarking the areas of law? For law has not yet found its Linnaeus.

Most people begin, quite rightly, with the working hypothesis that language group or ethnological group is likely to correspond with a law group. We know very well that this does not always follow; that probably the law area will correspond with a culture area of Bugis and Macassar men, men of Buru and men of Ceram, Gajos and Bataks; each pair has two or more languages but one and the same customary law, while Middle Java and the Native States of Java have one language but two different adat laws. But as working hypothesis the supposition is useful.

And what do we then soon discover? That each of these law-circles has something eccentric in it. The Batak country has its couple of chiefs, including—sometimes—adat guarantors; Minangkabau its family rule, its suku, its expulsion; South Sumatra its responsibility of the law-circle as a whole for certain crimes committed there; the Minahasa its contract of taking care of old invalid people; the Toraja-country its *verborum obligatio* (the binding word "io"); South Celebes its ornamentship and child distribution; the Ambon-Moluccas, the ground guardian, and the gathering interdict; Timor the pre-betrothal; Bali the water district; Middle Java the late kernal villagers as disinterested "elders." The eccentricity may also consist in an unusual combination; Bali combines with a patriarchal law of low standing, a high standing agrarian law; the Mèrina (the central plateau of Madagascar) combines with an advanced parental law of kinship antique remains of paternal power over the wife (expulsion) and the children. The eccen-

3. For instance, *Post*, "Ueber die Aufgaben einer Allgemeinen Rechtswissenschaft" (1891), pp. 77-79.

4. *Erste Hälfte* (1914).

5. "Works," VIII (1807), p. 323.

tricity can furthermore be found in the absence of some institution that might be expected—in Indonesia, for instance, in the absence of associations of villages set above the villages (Java and Bali), or in the absence of the external sign as a bond (Karo-country)—or in an unusual method of law growth (of wearing away, of transition forms etc.). Hardly any of these eccentric forms become sufficiently visible as long as the study of the law is only rough and universal.

If now, all such eccentricities are set aside, there remain within one law tribe a number of corresponding law phenomena, corresponding in spite of widely differing stages of law development, and in spite of capricious disposition of the material (here the tribes dwell apart, there together; here the dowry has remained as a rudiment, there it has been lost), a similarity that is most striking where it is not found in one or another distinct institution, but touches the whole frame of the law; thus, the part played by Dutch Indian and Madagassy villages in the maintenance of the ancient adat law resemble each other as two drops of water: their methods of decreasing old adat tariffs without altering them, by the application of new-fashioned taxations, or those things which in both of them give rise to complaints of the inadequacy of the popular law. Most of these close correspondences entirely escaped notice in the time of wholesale, universal study of an entire law tribe or even more than that, but become more and more sharply defined in proportion as within one law tribe the centre of observation is more narrowly confined, but also moved from one circle to another.

III

Can the same method, now, the method of the eccentric, be urged if we climb up from circle law (corresponding to the language) to the law tribe or even to the law family? From Atchin law, Sundanese, Punjab, Swedish, Kabyl, and Mzabitish law⁶ to Indonesian or even Austronesian law, to Anglo-Indian or Germanic or even Indo-Celtic law, to general Algerine or Maghribine law?

How little has been done in the way of sharp demarcation for these larger law areas is amply evident. Law tribe and law family are, as far as I know, nowhere distinguished from one another. In spite of a hundred years of conscientious Germanic law study, the law of the Germanic law tribe taken as a whole has not yet

6. Cf. *Hanotaux*, "L'Energie française" (undated), pp. 303-306.

been treated; that the island of Halmahera falls outside the Indonesian language tribe is certain, but whether it may belong to the Indonesian law tribe no one can yet say; it is even an open question whether everywhere, beside the large language families, large law families are to be found (an Indo-Celtic family, an Austro-nesian family etc.), or whether law grouping ought not to stop at law tribes. In my opinion, there, too, the "clare ac distincte percipere" can only be reached by searching and continuing to search for the eccentric (to which perhaps belongs an Aryan predilection for the number five and an Indonesian and ancient American predilection for the number four), and to this end I would like to suggest a simple plan, which, I believe, differs from that generally used.

When a person who is thoroughly familiar with law system "A" comes in contact with law system 'B' or 'C,' with which he is only slightly acquainted, it is the relationship between the two systems that strikes him most forcibly; for instance, that the *res mancipii* of ancient Rome is found again in Atchin, the *autoketa* of ancient Hellas in the Padang Plateau, the old Dutch law of letting cattle freely in on stubble field in almost the whole of Indonesia, the old Israelitic mohar and the Homeric *ewedna* (dowry) in the sun-rang of South Celebes. Comparisons then naturally occur to him, such as between the Javanese *desa* and the Germanic mark, of Teutonic and Indian village communities, of Annamitic, Madagassyn, and Roman⁷ law or of Semitic and Aryan law;⁸ then he begins to determine THE origin of "marriage" or THE origin of "ground ownership," things which as a matter of fact do not in any way contribute to the solution of the problem indicated here. But if, now, the same person being familiar with system 'A,' allowed himself to be questioned by those who are familiar with systems 'B' and 'C' with regard to what they consider to be essential and typical in 'B' and 'C,' merely to say whether the same things are found in law system 'A'—"Does it contain a law speaker or is there no trace of him? Does it contain the right of disposal of ground by native communities, or is there no trace of this? Does it contain the guess sum in agreements? Does it have the same method of reckoning relationships (counting or classifying system), the same transition from rigid to supple law, the same systematization?"—then for each law

7. Girault, "Principes de Colonisation,"⁸ II (1907), p. 60.

8. Tarde, "Les Transformations du Droit,"⁷ (1912), p. 35, note 2, 175.

tribe the peculiarity and exceptional characteristic could be traced out.⁹

And, moreover, that which in the former investigation of the circle laws was a means of distinction and limitation, what was there a means of *dividing* the law tribe into a mosaic of circle laws, now turns in a surprising manner into a means of *re-uniting* the composing parts of these law tribes. For what do we find? That within the geographical resort of one such law tribe it often occurs that the eccentricity of circle law 'A' situated at one extreme of the mosaic corresponds to the eccentricity of circle law 'B' at the other extremity. The couple of chiefs of the Batak country is found again on the island of Sumba, the pre-betrothal of Timor with the Dajaks and on Palawan (Philippines), the water district of Bali on Luzon (Philippines), the ground guardian of the Ambon Moluccas, both in the Kampar district of Sumatra and on Mindanao and Luzon (Philippines), the gathering interdict of the Moluccas as well as the invalid people contract of the Minahasa and the law proverbs of Minangkabau on the far distant island of Madagascar. We are of course not justified in shouting "Eureka" until we have attained as sharp a recognition of differences and similarities as in comparative philology, in particular the Indo-Celtic philology, but these paths seem to run in a direction that is full of promise.

For the success of these investigations the relative importance of the law that is to be examined is, of course, not significant; the adat law of Nias or the popular law of Iceland might be, as a link, a coupling joint, of more importance than that of Bengal or Japan. But it can only be welcome if the law which is important for science is at the same time that of a large rich field with a great future. As the method of comparative philology was originated through the study of Sanscrit and practised through the Indo-Celtic tongues, so perhaps, the method of the comparative study of law could be best practised on the great mass of Indonesian law spreading from Madagascar to Formosa. In any case, let each in his field of law work as if his material were to become what Sanscrit has become for the whole science of philology.

IV

Law students like to be practical, and therefore they will soon raise two questions, which may at the same time serve for my concluding remarks.

In the first place, is there a permanent element in a law family

9. Cf. Lasch, "Der Eid" (1908), pp. 74-75.

of this kind? or do all legal systems, once they are full grown, come to resemble one another? Is it true that "all laws, however dissimilar in their infancy, tend to resemble each other in their maturity"?¹⁰ Is it true for laws what Trombetti maintained for languages, that the primitive language is stable, but the language of civilization is supple and changeable? Do law systems even grow towards each other into one cosmopolitan law? It would be premature to answer this question, but if we may draw conclusions from small to great, it should be observed that there is nothing, or remarkably little, to be seen of an approach of the highest development of the Indonesian circle-laws to any western form of law. Just as a correspondence in the physiological build of the mouth and the physiological arrangement of the vocal organs brings with it similarity of the nature and variety of sounds, and just as there is a correspondence of language architecture (idiom and syntax) to be found between unconnected languages from quite different parts of the world, in the same way a similarity of human relations and needs will bring about a certain resemblance in laws and their development. But even the adoption of institutions from the English constitutional law by the continent often led to something different from what the institutions were in England itself.

In the second place, if the Roman private law and that of the French Revolution could be, to a large extent, accepted by Western Europe and was able to establish its uniformity where there had been previously legal diversity, a fact which seems in accordance with the hypothesis,¹¹ that in the end one legal system will win against all the others, will it not presently be the same over the whole world? Here the answer is simpler. The fact that, just as of ancient Hellenic and Germanic,¹² so later Roman and French law were able to be inserted to some extent into related Indo-Celtic laws, in no way proves that a similar insertion would be successful in Chinese, African, Oceanic, or Indonesian law. If there really is anything of a deeper lying distinction between law tribes and law families mutually, then a government that aims at the natural and laudable object of a greater uniformity of civil law for the Dutch Indies, will do well to take as the basis of its unification, not one or other law system from the Indo-Celtic group—be it that or Rome, or Paris, or The Hague—but the Indonesian law tribe itself.

10. *Sumner Maine*, "Village-Communities in the East and West" (1881), p. 332. (Opinion pronounced in 1856.)

11. *Tarde*, "Les Transformations du Droit," 1912, p. 204.

12. *Grotius*, "De iure belli ac pacis," II, 8, I, 2 (edition, Molhuysen, 1919). p. 228.

THE PEOPLE'S LAW BUREAU

BY WILLIAM V. ROWE

As we shall show, presently, our people's government and their law—unquestionably the best on earth—constitute a national machine which, from its very nature, can be operated only by *lawyers*, as the leaders and chief *servants* of the nation. Prudence and the law of self-preservation, therefore, demand that the people insist upon the highest possible qualifications and upon a complete and perfect training for these indispensable public servants and engineers of the public welfare. It naturally follows that nothing less than substantial college and law school degrees, and adequate clinical experience—in themselves, the demonstration of proper preparatory and technical training—can be accepted or tolerated.

The Great War has given tremendous emphasis to this particular matter, for it has made clear to us that the incompetency and inefficiency, in the highest and lowest stations, of these servants of the people—both during a war, and thereafter in the construction of the framework for an ultimate and abiding world-peace—may waste and misdirect, in a thousand vital relations, a stupendous national energy and intelligence, which, in this instance, for example, have been greater in amount and scope than those produced and applied by any people at any other time in the whole history of the world's affairs.¹

The war, then, has been the time of times to prepare for peace, to take an account of stock of our governmental affairs, and to take new soundings and re-establish bearings under our system for the administration of justice. "Preparedness" for the future is the keynote of the hour. It cannot be struck effectively, however, without a serious overhauling of our legal machinery, which, with us, controls the entire administration of government and of justice under law.

Such an overhauling is now made possible by the extraordinary opportuneness of the strikingly comprehensive and instructive survey, by the Carnegie Foundation for the Advancement of Teaching, of American legal education, qualifications for the bar, and legal aid work. That survey is now approaching completion, and, will, it is

1. What is written is not intended to have any political significance or bearing whatsoever.

believed, accomplish, for right progress in the people's law and government, results at least as beneficial and enduring as those for the advancement of the people's physical well-being, which have flowed from a similar special and notably able survey of American medical education and the qualifications for the practice of medicine among our people.² "Preparedness" of this nature is our lesson of today, but, while it must be intensive to be useful, it must and can be worked out only in the light of a broad and true vision and a correct historical perspective.

Our law, the common law of England, has its roots embedded in the earliest community life of the Anglo-Saxon race. It is essentially customary and community law, the people's law, growing from day to day and generation to generation with the life of the people whom it affects and controls, and is altogether the most efficient system—we necessarily speak in superlatives—ever devised for the promotion, under an orderly reign of liberty, justice, and security, of human happiness and sound development to the highest point presently attainable. Our government, the most satisfactory thus far provided, was made workable only by the operation of that legal system, which also alone made possible the Constitution of the United States and that best expression of the objects of all government contained in its remarkable preamble. Just as this body of law, from its source in the customs of the people, is a living thing, developing solely from and with the daily life of the people themselves, expanding like an ever-living flower, spiritual in its nature, and never quite reaching full maturity, so the government based on that law, and necessarily partaking of its nature and qualities, is and must be a thing of constant change, even within alleged fixed limitations, in its effort, both unconscious and deliberate, to conform to the people's growth and will. That growth and the universal spirit of change, it may be said in passing, will receive a wonderful impulse from the necessary mixture of races and nationalities in the recent war, which, by crucifying all selfishness and crowning the spirit of service and self-sacrifice among the nations and their citizens, is to be regarded as a special and providential instrument for the general uplift and advancement of all humanity.

2. Two parts of the Carnegie Foundation's Report have already been published—Prof. Redlich's paper on "The Common Law and the Case Method in American University Law Schools," and the recent review of Legal Aid work, entitled "Justice and the Poor," by Mr. Reginald Heber Smith, of the Boston bar, counsel for the Boston Legal Aid Society—both comprehensive and able papers. Copies may be obtained from the Foundation's office, at 522 Fifth Avenue, New York.

It follows, necessarily, that this common law, with its "government of the people, by the people, for the people," can pursue its natural course and have its normal development only when the general mass of the people and their customs and daily controversies are constantly brought in contact, on the one hand, with the courts, which are the instruments we have set up for developing and applying our customary law, and, on the other, with the various other departments of our government, which are the agencies devised for executing and administering the law, and conforming it by statute to those quick changes in public opinion and in the people's will and customs, which the courts cannot with sufficient promptness express and register.

Naturally, as we have repeatedly pointed out, the government of a free people, based on law and order and built up from a legal system of this type, must be essentially and almost wholly legalistic, dependent for efficient administration on the people's lawyers as the people's principal public servants and most useful governmental agents. In other words, what was intimated at the outset is literally true—lawyers have necessarily become our governing class, so far as that term, in the modified sense of leaders and *public servants*, can have any currency among us. Indeed, a reference to common knowledge and familiar statistics will show that *two-thirds* of our presidents and senators and *more than one-half* of our congressional representatives and state legislators have always been lawyers.³

Popular education and universal suffrage have in large measure solved the problem of popular contact with general governmental administration, but the contact of the great mass of our people with the courts, the only means regularly and normally available for formulating and developing our customary law, has now almost wholly failed. This condition has prevailed in increasing degree for a generation or more, and, even though that be but a moment in the growth of a people, it is time that the evil should be understood and a remedy provided. Fortunately, this work of the Carnegie Foundation will furnish the necessary means to that end.

For some hundreds of years the common law (including, of course, equity as its aid) had jogged along comfortably in the dignified and deliberate service of old-fashioned agricultural and com-

3. 12 New International Encyclopedia, p. 36—Article, "Lawyers." See also Rowe on "Legal Clinics and Better Trained Lawyers—A Necessity," ILL. LAW REV., XI, 591 (April, 1917); and on "Joseph H. Choate and Right Training for the Bar," *Case and Comment*, September, 1917, particularly pp. 275-6; where similar comment has heretofore been made on these fundamental facts.

mercial communities and of an old-fashioned commerce—all developed under the wise guidance of our earlier and later Cokes, Blackstones, Mansfields, Hardwickes, Eldons, Marshalls, Shaws, Kents, and Storys, but in the last quarter of the nineteenth century, under the whip and spur of the modern corporation industrialism and the vast and rapid growth of mining, commerce, and transportation, which followed the close of the Civil War, and particularly after 1880, there came about the unprecedented but now familiar development of mechanical energy and of general business throughout the civilized world, with specially violent changes and eruptions in the established order in America and in England and her colonies. Through the corporate organization and reorganization of all transportation, commerce and business, lawyers quickly lost their purely detached professional relation, leadership, and isolation, and, under the influence of annual retainers, became the paid servants of business, and an actual part of the hurried and excessively busy commercial life of the period. There resulted certain profound and radical changes which in this brief review may be rapidly sketched in outline as follows:

To be first noted were the tremendous increase in legal business and a corresponding expansion of the common law, arising from Civil War business and claims, and, later, from all this commercial, mechanical, industrial, and business development, from the consequent concentration of population in cities, and from the increase in labor and social legislation and the general exercise of the state and national regulatory police power. In short, notwithstanding the fact that the mass of the people were crowded out of all contact with the law, the general demands upon the body of the law, and therefore upon lawyers, increased out of all proportion to the growth of the means, in the number of *capable* lawyers, capacity of courts, and scope of legislation, and powers of government, with which to cope with such demands.

Business and corporations thus absorbing the better class of lawyers, the work of lawyers became in this way exceptionally specialized, and the enormous increase in such specialized business completely occupied their time and attention. In other words, business absorbed the law, and the law gradually limited its development to business. General practice and legal aid work, in the nature of charity practice for non-paying clients and work for clients with small cases and paying small fees, were gradually sloughed off by the profession.

The legal business and just claims of these latter classes, con-

stituting the great body of our citizenship, which, prior to this period, had been reasonably well cared for by the foremost lawyers in the profession, were, in varying degree, for many years following 1870, left without any adequate attention or service from any quarter. The people at large thus gradually lost touch with justice and the law.

To supply the urgent need, but without any conscious purpose or special preparation or any real understanding of the reasons founded on such then-existing conditions, there grew up during the '70s and '80s a body of lawyers known as contingent-fee practitioners, who, to some extent, cared for the startling increase in the governmental, industrial, and transportation claims of the people, by taking their legal fees and expenses out of a share of the recovery, if any. Some elaboration and changes by statute and by the courts in the common law of maintenance and champerty made possible this particular development. Much legal business of the people was gradually included in the contingent-fee practice, which in itself, nevertheless, proved utterly inadequate as a means, in this new era, for bringing remedial justice home to the people.

The "Alabama" and other Civil War claims, with some Mexican claims, substantially all of which were prosecuted before Congress, legislatures, or the courts on a contingent basis, gave the first impulse to this new business. No one, however, who knew of it can ever forget the horror of the legal profession, in Puritanical Massachusetts, for example—a feeling which showed itself in a sort of cold-shoulder or ostracism—over the assumed departure from tradition of an eminently respectable Boston practitioner (Linus Child), in taking, on a contingency, certain congressional claims arising from the Mexican troubles of the '40's. In the light of later experience, it was all very amusing, although very seriously regarded at the time. A case was made and the matter was carried to the Supreme Court at Washington, which (speaking through Mr. Justice Swayne) made some solemn pronouncements and preachments on the subject, which, however, had little, if any, effect on the development of the law.⁴ The popular demand for an outlet, through contingent claims, for the bottled-up legal business of the times, led to the constant expansion of the business in such claims.

Then followed, within the last twenty-five years, the increasing growth of the work of Legal Aid Societies—most unhappily so-called, because, dealing with the fundamental conception of justice

4. *Trist v. Child*, 21 Wall. 441.

under law, the name suggests the granting to the people as favor or charity what they are clearly entitled to receive from the state as a right—a work organized to fill the then-recognized gap, and, by doing the neglected work of the bar, to bring law and justice once more to the people.. Of course, for that reason, those societies, as private associations, should have been chiefly supported and maintained by lawyers, in paying their debt to their profession, but such support was not forthcoming, the field and amount of other support were narrow and limited, the work languished for years, hardly scratched the surface of the public need, and, even with the most self-sacrificing devotion of legal-aid workers and with the normal increase in the contingent-fee practice, demonstrated from year to year its own inadequacy, without further support and facilities, as a proper measure of relief.

The courts and judges were increased in number, but this failed to meet even the current restricted demands of the people. There followed increasing delays in the work of the courts, which fell woefully behind the times and lost contact with existing conditions and popular sentiment.

As a consequence, the public demanded great reforms in and simplification of judicial procedure and many changes in the substantive law. This demand brought about an abnormal increase in the number of statutes, with awkward, ill-conceived, and poorly-executed attempts to Prussianize our law by codification, and a corresponding increase in the work of the courts, already over-burdened, in the determination of mere points of practice and in their effort to construe this mass of modern statutes, a large proportion of which were incompetently framed. The law's delays grew from year to year, and this statutory growth of law and the confinement of the work of the courts so largely to questions of statutory interpretation naturally led to a further unfortunate interruption in the normal development of the people's customary law as the common law of the land.

The constant increase in business also naturally produced a corresponding demand for a larger number of competent lawyers and courts. The absorption of the law by business led to the education of American lawyers in law schools rather than law offices, with a consequent undue emphasis on bookish theories. There was no longer any room or time for mere students in the modern specialized offices devoted to business and corporation law.

This general incompetency and inadequacy, the continuous increase in business, the gross abuses in the contingent-fee practice

—which arose through corrupt dealing with corporation-defendants, the absorption by lawyers of too large a share of recoveries, and the corrupt methods of the so-called “ambulance chasers”—produced certain natural and logical results and reactions, some of which have already incidentally been referred to. There arose great and continuous popular discontent, based on a distrust of courts and lawyers and of “big business,” of which lawyers were known to be a part through salaries, annual retainers and investment participations.

In the vast growth of statute law and in its poor draftsmanship, the people have also found conclusive evidence of a disastrous breakdown in legal educational work—not in any educational “system,” for there is no “system,” either through the governmental regulation and standardization customary in like cases, or otherwise.

Then they have noted the blighting effects of modern industrialism and commercialism on the training of lawyers, by making office students and office and court training, and all “clinical” work, largely impossible as a part of legal education.

In this way there has come about this existing belief in the utter inability of the mass of our people to secure law and justice through either courts or legislatures, and a recognition of the necessity for the immediate extension of Legal Aid Bureaus as *The People's Lawyers*, and for the development, revamping, and perpetuation of the common law itself, as the people's law, through the courts as the only possible way, and through the universal use of the courts, by the people, by means of popular legal aid agencies. Let it be said at once, however, that new-fangled courts, with various social-service titles, cannot, in what must be their judicial and quasi-judicial service, take the place of “legal aid,” in filling its familiar office as *counsel* for the people. That is the point. No court, whatever its name or function, can possibly, in the nature of things, serve as court and counsel at the same time—and, clearly, the poor as well as the well-to-do are entitled to the independent advice of independent counsel at all times. Such advice, it is the business and function of the “legal aid” to give.

All these considerations have led to the conviction that the all-round clinical training which lawyers themselves formerly supplied, inadequately enough, in their offices (and which England—with no law schools—still furnishes), must now be efficiently furnished by the intimate association of law schools with such legal aid work, in

what are aptly called "legal clinics,"* and that such legal clinics and all legal educational work and the qualifications for the bar, as affecting the quality and quantity of legislative and judicial work, must, in the people's interest, be uniformly regulated and standardized by the states and nation.

Of course, it is at once admitted, any such action would mean an upsetting of the traditional routine of the law school curriculum, of almost bureaucratic rigidity, scraping off the barnacles, and the abandonment, in large part, of the unquestioning worship of the dead "case-books," and the substitution therefor, in great part, of the living cases of the moment, now to be found only in these general clinics of the people created by legal aid work.

Utterly lacking in scientific rigidity, fixity and exactness of formula, and always flexible, the common law's principles and cases of today cease to be the people's principles and precedents of tomorrow. We complain desperately of the multiplication of precedents and reports—which are, after all, not out of proportion to the increase in the amount and complications of modern business. In this, we forget the casting-off process of nature, the natural corrective, which makes last year's leaves merely the fertilizer for those that follow. We collect the books in libraries, because the fertilizer *may* be useful, but now seldom find it either desirable or necessary, in the more rapidly growing branches of the law, to refer to reports more than five or ten years old. This rejection, or rather disregard, of the water that has already turned the wheel is never deliberate, but is simply the unconscious effort to conform to natural selection and development and to lay stress on the living present. Clinical and experimental in progress, and always growing, the common law thus meets, with the utmost sensitiveness, each change in public opinion and in the people's passing, but confirmed, view of life. That is what Rufus Choate meant, when, with a vision born of the abiding inspiration which, in truth, burned up his life and sadly limited his days among us, he declared, in his great speech on "The Judicial Tenure," which cannot be too often quoted, that—

"He who would be a lawyer *must unite the study of the books and the daily practice of the courts*, or his very learning will lead him astray."

5. During the last three or four years, and without any propaganda or concerted effort, law schools, North, South, East, and West, have enthusiastically applied this idea of the "legal clinic"—a demonstration of its soundness and of the people's need. It has been in the air and has been instinctively drawn upon, for the time has been ripe for this particular development. See *ILL. LAW REV.*, XI, 591, XII, 35 (April and May, 1917).

The basis for the schooling of the common lawyer, in other words, must be found, not merely in the dead books, recording only the past, but, equally, if not chiefly, in the courts and legislatures of the people, in constant contact with the ever-changing life of the moment. This apparently unsystematic development of the law from the past—from history and experience, on the one hand—and from the present—from existing theories, prejudices, and ideas of convenience, on the other—is nowhere better described than by Mr. Justice Oliver Wendell Holmes, in his lectures of a generation ago on "The Common Law."⁶ He then wrote:

"The life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law, at any given time, pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

Therein lie the true dignity and significance of our law—its recognition of a "social sense" and its accommodation to social changes. For us Anglo-Saxons, it is the law of life—our own life—not an artificial, codified, exact and rigidly mathematical thing, foisted upon us with autocratic sanctions, but a beneficent and ever-flexible, and accommodating force, sanctioned only by social convenience, righteousness, and justice, by the people's will and the common weal. The rule of precedent and *stare decisis* of course prevails, and yet, at the same time, there is the slow march from precedent to precedent. In the future, the march must go faster, for life and social changes are now, and will be, much faster. The bark of the tree is always expanding, but in the twentieth century and thereafter it must expand more rapidly and readily than during any historic past with which memory is familiar.

Perhaps we may say that the present emphasis on the conscious association of the law with social progress, that is, with life itself,

6. Holmes, "The Common Law," pp. 1-2 (Lowell Institute Lectures).

now produces a daily conscious advance in the common law never before deemed possible or desirable. Our law was always a conscious part of our life. It has now become a conscious part of world-life.⁷

It follows that the existing popular belief is well-founded, and that some method must be found to re-establish constant contact of the courts with the current life of the people and with current public opinion, and to maintain and develop such contact on the part of the body of the bar and of its students, as the servants and prospective servants of the people, in the formulation and presentation of that public opinion and of the people's customs in the current life of the day. That means, as the people believe, simply the development of "legal aid" work and the introduction, for students, of the "legal clinic" as a part of that work. In this way alone can the "social sense" of our law find its natural and proper expression, and the intimate relation of the people to their law, through their courts, be uniformly maintained. Thus, alone, can the common law grow naturally and justice be made secure in her seat in the courts of America.

At the 1917 meeting of the American Bar Association, a majority of its Committee on Legal Education took occasion to fly in the face of the movement for legal clinics, now under full headway, by voicing an objection, possibly born of the limitations of the country college and the small city law school, to adding clinical work to the other work of law students, saying:

"In doing so, they are taking time from the theoretical study of law to do work and acquire training which *normally comes after graduation* from the law school, and which can be much more quickly and effectively learned then."⁸

This statement is the product either of extreme inexperience in active modern practice, or of extreme forgetfulness—perhaps both.

7. See Dean John H. Wigmore's strikingly suggestive article, above referred to ("Nova Methodus Discendae Docendaeque Jurisprudentiae"), Harv. Law Rev., XXX, 812, at pp. 817, 819, 823-825, 827-829 (June, 1917). Recently the Harvard Law Review has considerably opened its pages to a useful discussion touching some of these ideas. In addition to Dean Wigmore's article, we find the paper of Léon Duguit, Harv. Law Rev., XXXI, 1, at pp. 181-183 (Nov., 1917), in which he recognizes the "state" as a society to accomplish "services for the benefit of all," and proclaims the "jural principle" as the recognition of "social interdependence"—of what is "social," or of "social value," as right, and of what is "anti-social," or of no "social value," as wrong; and the articles of Judge Fowler (with an incisive and clarifying commentary by Dean Pound) on "The New Philosophies of Law," Harv. Law Rev., XXVII, 718 and 731, et seq., and of Nathan Isaacs on "The Schools of Jurisprudence," Harv. Law Rev., XXXI, 373, 406-411.

8. 42 Am. Bar Assn. Rep (1917) at p. 471.

Indeed, properly speaking, there is nothing "theoretical" about either the common law or its study. They are both purely and intensely practical. If the committee, in its majority report, means to suggest the making of clinical work a post-graduate course, the suggestion, while lacking practical weight, may be debatable. If it means that it is desirable to continue existing conditions, as to what "normally comes after graduation"—a time when, for the average mass of young lawyers, nothing is ever "quickly and effectively learned" or acquired, but when, on the contrary, their utter ignorance and lack of *savoir faire* prey on a suffering community for fully ten years, while they are "effectively" learning, at the public's expense, what the medical and surgical clinic now teaches the medical student in a three or four years' course, and what the law schools' legal aid clinic, or other similar required clinical work, should teach the law student throughout his course, or, at least, in a single year's complete and intensive course—if that is what the majority of this committee means, then, it is submitted with great respect, in the light of actual experience, their judgment is without support and must be reversed.

The requirement, at the present time, in the interest and for the safeguarding of the public, of prescribed and systematic clinical work for law students is just as essential as is the long-established association of laboratory work and surgical and medical clinical work with the study of medicine. In no way, as Professor Redlich emphatically declares, except through actual daily practice can the "peculiar instinct" of the profession be acquired. This "peculiar instinct" is merely what we term "*savoir faire*." As Professor Redlich says—

"No theoretical instruction," in law schools or otherwise, can supply this instinctive knowledge, facility, and consciousness; on the contrary, as he further insists, *"only the direct atmosphere of daily professional life can furnish to the beginner certain experiences and qualities which are of great practical importance"*⁹

And here again we must recall the warning of Rufus Choate that, to avoid being led astray by mere book-learning, the would-be lawyer "must unite the study of the books and the daily practice of the courts." Certainly, the community is entitled to insist at least upon such competency and right training on the part of all law

9. Prof. Redlich's Report for the Carnegie Foundation on "The Common Law and the Case Method in American University Law Schools," p. 38; Rowe's "Legal Clinics and Better Trained Lawyers—a Necessity," *ILL. LAW REV.*, XI, 591 (April, 1917); Wigmore's Legal Clinics," *ILL. LAW REV.*, XII, 35 (May, 1917).

students before they are sent forth, duly licensed, with a ready-to-wear label, to serve the public. We must never forget the quick success of the intensive practical training in our war camps and in other centers of practical instruction.

While the Committee on Legal Education of the American Bar Association makes no recommendation on the subject of legal clinics,¹⁰ Mr. Bird of that committee emphatically dissents from the report of the committee on that head, and states the correct view as follows:

"The certificate of admission to the bar represents to the public that the candidate is qualified to practice law. In fairness to the public we should do what we can to give the student *not only knowledge of the law but also knowledge how to apply it*. I therefore think some legal clinics should be required in every course. *Legal clinics teach more than practice; they are a very effective method of teaching substantive law as well as the art of applying it.*"¹¹

That is an excellent statement of the purposes of the legal clinic. Inasmuch as the clinic is actually being adopted by our law schools throughout the country, in a great and rapidly progressive movement, the ultra-conservatism of the majority of this committee may be disregarded, for it is needlessly concerning itself with water that has already passed over the dam. There is also a noticeable tendency to insist (contrary to the advice of the short-sighted and thoughtless politicians who frequently control state legislation) on the highest practicable standards—absolutely necessary in America—for preparatory educational work and for law-school degrees and admissions to the bar, and one notes in addition an occasional quick perception by the people that, with a body of better-trained lawyers, thus certain to be produced, from whom to draw *our public servants*, there would necessarily be less legislation, better legislation, better courts, less of the law's delays, a better governmental administration, and, as a consequence, a normal development of the people's law and government, and a speedy subsidence of exaggerated and harmful discontent. Above all, as a distinctly practical proposition, it is seen at a glance that the people would at once begin to *save money*, by avoiding in this way, the familiar *wasteful extravagance* which always results in all the relations of life—in the law office, the public office and the courts, as well as in the family kitchen—from the employment of *untrained and poorly trained servants*.

10. P. 475.

11. 42 Am. Bar Assn. Rep. (1917) at p. 476.

It is realized that, as the national government, under our system, is thus peculiarly dependent on the competency and efficiency of American lawyers, there must speedily be provided, for the continuous improvement of the whole national administration, adequate federal regulation of all legal education and qualifications for the bar—to be accomplished either directly, or indirectly through the establishment of standards for federal service, and in either case through a separate national council of legal education, or through rules of the Supreme Court of the United States.

The natural and familiar compelling influence upon the states of the fixing of educational standards and qualifications for federal offices and services will be almost as effective as a direct general and mandatory provision of a federal statute, universally applicable to legal education and qualifications for the bar throughout the nation. The latter, it would be insisted, is constitutionally justified on the ground that nearly all important federal officers, under the Constitution, always have been and always will be, naturally and necessarily, drawn from lawyers, and that the efficiency of the government, from its very constitution and nature, rests upon the training and efficiency of the lawyers of the country.

And so it is that we readily reach the conclusion that the people must come to their own once more, and quickly be brought into habitual and continuous touch with what is in truth their own law and their own body of lawyers, through publicly supported and regulated "legal aid" work and the intimate compulsory association of that work with all legal education and with the clinical training of all students in the law. The "legal aid" will thus become in fact, what it should be in name, *The People's Law Bureau*. In no other way can liberty and justice, in this government of laws and not of men, be made to survive and expand as the most essential elements in the life of our day.

REVISING A CONSTITUTION

BY URBAN A. LAVERY

Let me, like a good preacher, begin this paper with a text:

"There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws."

The quotation is from John Stuart Mill and is found in his book "Representative Government," a work which contains some of the soundest political philosophy and criticism of modern times, written in a clear and fascinating style. Even a short experience with the problems of legislative drafting will convince anyone of the wisdom of what Mill has here expressed. And the author is equally wise in the conclusion which he draws from his statement, for he says:

"This is a sufficient reason, were there no other, why laws can never be well made but by a committee of a very few persons."¹

One has only to open the volumes of the modern acts of Parliament of England, as found in Chitty's Statutes, to be convinced that making laws is indeed 'a business' which may be done scientifically, and with system and precision; and to be further convinced that with us in America the 'business' has been much neglected. But such matters are beyond our special subject, which is the revision of the Illinois Constitution by the Convention of 1920. This paper will attempt to give some suggestions on the subject of legislative drafting growing out of the writer's experience as draftsman for the revision committee of that convention.

It should be said by way of introduction that there are two well defined methods of drafting a constitution. The first is by what may be called the 'piecemeal method,' or that of submitting separate amendments. This was done in Massachusetts from 1912 to 1915, and more particularly in Ohio in 1912, when nearly forty separate amendments were added to the old constitution of 1851. The other method is by complete revision as was done in Michigan in 1908, and attempted in New York in 1915 when the constitution there proposed was defeated by the people. The present convention

1. J. S. Mill, "Representative Government," p. 109.

early decided to adopt the latter method, and I think wisely, for there are serious drawbacks and difficulties involved in weaving new patches into an old coat. The present convention, moreover, decided to adopt a new policy, for it charged its revision committee (or Committee on Phraseology and Style) with the duty of making an exhaustive study of the meaning of every word and phrase used, whether in the existing constitution or in the proposed changes. This duty was to be in addition to the duties of the committee in considering the form and diction of the constitution. In other words, the convention decided to follow the advice of Mill and to turn over the work of drafting, as such, to a "committee of very few persons." As a result of this new policy and also as a result of the methods which the committee has adopted in its work, the new constitution seems likely to prove a ground breaking instrument in many respects. At least it will be short, precise, and clear, to an unusual degree. And let no one underestimate the difficulty of such a task. Lest one should be inclined to do so let us refer to the opinion of Austin, the well-known English writer on Jurisprudence, who is said to be more responsible than anyone else for the form and expression of the modern English statutes. He says:

"I will venture to affirm that what is commonly called the technical part of legislation is *infinitely more difficult* than what may be called the ethical part. In other words, it is far easier to conceive justly what *would be* useful law, than to *so construct* that same law that it may accomplish the design of the law giver."²

What then are some of the lessons to be learned from such a task? And in what respects is the new constitution likely to prove a departure from the past? A few illustrations will best answer these questions and at the same time carry out the purposes of this paper.

Let us first consider in a general way the matter of verbosity and redundancy. If we take up Kettleborough's "State Constitutions" (which, by the way, is an excellent modern compilation) we find that the federal Constitution as originally drafted covers less than *eight pages* of that book. At the other extreme is Oklahoma with its constitution covering *fifty-eight pages* of the same volume—more than seven times as long. The present Illinois constitution is a fairly long one, for it covers *thirty-one pages*. It is likely that the new draft of the constitution will be about half that long. A very large part of that reduction is due to the careful weeding out

2. See Ilbert, "The Mechanics of Law Making," p. 98.

of excess words and phrases; in other words, to avoiding verbosity and redundancy. It will be readily seen even from this illustration how important in drafting laws is the matter of expression.

The matter of style is really something of first importance not only in writing laws but in writing anything else. Pater, in his "Essay on Style," contends rightly that style and substance are really the same thing. To prove this he quotes a famous passage from Gustave Flaubert:

"It is impossible to detach the form from the idea, for the idea only exists by virtue of the form."

DeQuincy, who was a great master of style, calculated that to cut one superfluous word out of each wordy sentence would decrease the time consumed in reading one-twelfth. Jeremy Bentham, who has been called the greatest of law reformers (and who coined the interesting word "nomography," which he defined as "the art of inditing laws"), spent his life insisting on shortness and conciseness in statutes. Ilbert, one of the best known modern writers on legislative drafting, who was for many years Parliamentary draftsman for the British Treasury, discusses Bentham at length in a way to show the importance of his name in any consideration of our subject.³

Another writer on style and form in legislative drafting, whose work is a classic for its philosophic treatment of the subject, is Coode, a member of the Inner Temple, who wrote a small pamphlet on "Legislative Expression"⁴ as a part of a report presented to Parliament in 1843. The author attempts to make a set of rules, almost as precise and compact as the multiplication table itself, for the form and phrasing of statutes. Of course, he fails, but some of his suggestions and rules are of great interest to the modern draftsman. Thus he lays his finger on a defect which somehow always persists, when he says:

"There is apparently a notion among amateurs that legislative language must be intricate and barbarous. Certain antick phrases are apparently thought by them to be essential to law writing. A readiness in the use of 'nevertheless,' 'provided also,' 'it shall and may be lawful,' 'he is hereby authorized, empowered and required,' 'nothing in any act or acts to the contrary notwithstanding,' etc., etc., seem to constitute the qualifications for drawing acts of Parliament. . . . It is, however, a clear mistake to think that this absurd style, prevalent as it

3. "Legislative Methods and Forms" and "The Mechanics of Law Making."

4. Printed in "Law Library," vol. 29; also found in Brightly's Purdon's Digest, 1873 (Pa.).

is and much as we sacrifice to adhere to it, has the sanction of authority. . . . In conforming to these rules" [the rules which the author has laid down] "it is to be observed that after all nothing more is required than that instead of an extended and incongruous style, the common popular structure of plain English should be adhered to."

The writers of the Constitution of 1870 either had never read Coode (which is likely) or else they had a large disregard for him, for in that constitution the words "provided however," appear *twenty-two times* and the phrase "of the same," appears *thirty-one times*, and other 'antick' phrases, as Coode calls them, abound.

Let me give you one illustration of the results which come from cutting out surplus phrases and omitting all needless words. In the Constitution of 1870 there are, in the article on Counties, thirteen sections which contain *fifteen hundred and fifty-three words*. In the draft adopted by the convention of 1920 and referred to the revision committee, there appear fourteen sections with *ten hundred and forty-six words*. In the draft which the committee will report back to the convention there will still be thirteen sections, but the number of words has been reduced to *four hundred and eighty*. From fifteen hundred and fifty-three words in the constitution of 1870 to four hundred and eighty words is a saving of *ten hundred and seventy-three words* in this article alone. And yet, I venture to assert that every idea, even in the slightest detail, has been retained and in many cases the language made much clearer. Enough has been said perhaps to indicate the grave necessity of brevity and conciseness in legislative drafting.

In constitutional law, as distinguished from statute law, the draftsman is concerned largely with matters of form, and frequently with the minor details of form, although, as will be shown later, he sometimes has much to do with the substance of the law as well. This is due to the fact that the policy and substance of constitutional law in most respects long ago became settled and accepted. But I will try to show that form and expression, even in matters of detail, are of the very highest importance. I have referred to Bentham; he was constantly emphasizing the fact that sentences should be short. In writing laws, as in writing anything else, there is a practical limit to the number of words which the mind can readily string together in a single line of thought. There is also a practical limit to the number of clauses and phrases which the mind can readily carry in one sentence. It is attention to these matters which gives one writer of English a clear and fascinating style, while their neglect makes another writer ambiguous and

verbose. Of course, it is with rhetoric, rather than with law, that we are here dealing, but the draftsman soon learns that his work involves the closest consideration of questions of rhetoric, grammar, and style as well as of questions of a strictly legal nature.

In regard to length of sentences, one of the worst examples to be found in any constitution appears in section thirty-four of Article Four, which was added as an amendment in 1904 to the Constitution of 1870. I suggest that you turn to the constitution and read the sentence. It is too long to quote for it covers nearly a page of print. This sentence contains *four hundred and ninety-four words*; it is nearly twice as long as Lincoln's Gettysburg address, which has *two hundred and seventy-three words* expressed in *ten sentences*. The sentence simply cannot be read or understood unless it is carefully and laboriously picked to pieces and analyzed bit by bit. Some of the separate compound clauses of the sentence might be split off as separate sentences, but even then the remainder would defy comprehension, without great labor and effort. It is simply an exaggerated example of what Coode calls "the apparent notion that legislative language must be intricate and barbarous." Of course there were reasons for making this particular sentence as comprehensive as possible but even at that, the structure and length of the sentence are indefensible.

Long sentences are under some circumstances unavoidable, but if properly constructed they may be made entirely clear. An admirable illustration of a long sentence appears in section eight of Article One of the federal constitution, which begins—"The Congress shall have the power," and enumerates the powers of Congress. This defect of long-winded and cumbersome sentences is not limited to legislative drafting; it appears constantly in lawyers' briefs and in the opinions of courts—indeed, it is almost a fixed professional habit. Let us refer to Barrett Wendell, who is a leading authority in America on matters of style and composition. In discussing this particular subject, he says:

"At one time it was my fortune to read a good deal of law; and even after I had learned what the technical terms meant, I found the greatest trouble in understanding the books. I open one of them now at random, and find the following passage in an opinion delivered by an English Court in the year 1842. 'The plea,' it begins, 'is a plea of set-off.' So far as it goes that sentence is clear; what we wish to know now is what a plea of set-off is. This, the next sentence proceeds, very properly, to define, but to define only as follows:

'Such a plea operates as a bar to the plaintiff's right of action, not by excusing or justifying the breach of promise complained of in the

declaration, but, whilst it admits such breach to have been committed, by setting up as a matter of compensation, the cross demand of the defendant . . . ; and it is unnecessary to observe, that an ordinary plea of set-off cannot be met by the general traverse, but only by a special traverse, or denial of the existence of the cross demand; and, upon another and distinct ground, the replication upon this record is inapplicable to the present case; for in those instances in which the plea goes only to matter of excuse of justification, and when, consequently, the general traverse is allowed, there is engrafted an exception, that where the plea justifies under any authority, or command, or license from the plaintiff, the general replication is not good without a special traverse of such command, license, or authority—'

I have quoted less than half the sentence in which that learned judge defines a plea of set-off. It is enough for our purposes; to quote further were needlessly malicious to the judge and to you alike. Already we are far beyond the point where any ordinary human being retains the slightest idea of what all this means."⁵

Concerning sentence length there seems to be a single rule of thumb, at once simple and effective, which can be used. The draftsman need only ask: "Will the sentence parse, and parse readily?" If not, it should be discarded at once. That indeed is really the basic idea behind the interesting scheme which Coode worked out for sentence structure. Coode's system makes for uniformity and preciseness of expression, but is too rigid and unyielding. The draftsman may still trust his literary instinct for these matters if he will follow the invariable rule in every sentence: "How does it parse?"

The question of section or paragraph structure is akin to this, although in this regard our present constitution may well be commended. The longest paragraph is section thirty-four of Article Four, which contains the long sentence already discussed. Here again Wendell can be read with profit for he devotes an entire chapter to paragraph structure. He refers to Burke's speech on "Conciliation with America" as an excellent example of paragraphing, and says:

"I have never read a more astonishingly lucid presentation of a very complicated subject. How is this lucidity secured? . . . Pencil in hand I analyzed the whole speech; and from beginning to end I found not a single paragraph whose substance could not be summed up in a single sentence."

In summarizing the subject this well known authority lays down a rule which is at once interesting, effectual, and concise. He says:

5. "English Composition," p. 222.

"Words and sentences are subjects of revision: paragraphs are subjects of prevision."⁶

So much for long-windedness. Another subject which concerns form and expression and is of equal importance in legislative drafting, is the choice of words and their meaning. Indeed, here is perhaps the most difficult part of the draftsman's work. A few illustrations will make this clear.

Section one of the article on Corporations of the present constitution provides in general terms that corporations shall not be created or have their charters amended by special laws, except those for "charitable, educational, penal or reformatory purposes which are to be and remain under the patronage and control of the state." The present convention adopted the section without change, but the words here used are unusual and have given the revision committee much concern. The committee went back to the debates of 1870 in an effort to learn what the language used meant, but one finds little help there. Neither in any prior constitution nor in the debates of any prior convention can one find language similar to "under the patronage and control of the state." Indeed, the debates of 1870 show that the language in question originated with the committee on revision and adjustment and first appeared in the report of that committee to the convention only two days before final adjournment. The words were adopted without consideration or discussion in the last hours of the convention, and the phrase quoted seems to have sprung, like Aphrodite from the waves, full born out of the mind of the committee on revision and adjustment. The interesting fact is that this peculiar and high-sounding phrase seems to have caught the fancy of later conventions because it has been copied verbatim into the constitutions of twelve other states—for bad drafting, like the measles is extremely catching. And yet a study of the decisions of these states as well as of this state fails to show that the phrase has ever been construed, and it seems safe to say that even to this day nobody knows exactly what "under patronage and control of the state" means.

The point to be observed is the danger of using strange and ill considered words and phrases in legislative drafting, and the likelihood that if they are used they will be used by somebody else later on. An even more interesting example of careless use of words is found in section five of the Executive article. This section provides that neither the Governor, Lieutenant Governor, Attorney General, nor Auditor of Public Accounts "shall be eligible to any other office

6. "English Composition," p. 117.

during the period for which they have been elected." The question immediately arises whether "eligible" means eligible at the time of election, which is usually in November, or eligible at the time the person takes office, which is usually in January. This point might have had a most emphatic and important interest in the last campaign if Mr. Oglesby had been named for Governor on the Republican ticket. He is now the Lieutenant Governor and his term of office as such does not expire until January first. It is worth knowing that when this precise provision was being debated in 1870, two members of the convention called attention to this point and said without contradiction on the part of any member of the convention, that 'eligible' would be taken to mean eligible at the time of the election. This construction would, of course, have made Oglesby ineligible to the office of Governor. This identical provision has been copied into the constitutions of seven or eight different western states and there is a sharp split in the decisions on the point whether 'eligible' means eligible at the time of the election or eligible at the time of taking office. If the constitution had said 'eligible to hold any other office' instead of 'eligible to any other office,' there could be hardly any doubt raised as to the meaning of the section.

And yet, even though precise and careful language is used, the Supreme Court may sometimes override the natural meaning of words—which calls attention to the point that a draftsman of a constitution must be thoroughly familiar with all of the decisions of his state construing the constitution. A good illustration of what is here meant is found in the article on Suffrage and Elections. Section one of Article Seven of the present constitution provides that "at any election persons who are male citizens," etc., shall be entitled to vote. In the case of *Plummer v. Yost*,⁷ decided in 1893, the Supreme Court, strangely enough, held that in spite of this provision women might vote for boards of education, for the alleged reason that such an office was not mentioned in the constitution, but was created by the General Assembly. The reason, of course, is no reason, for the constitution says "any election" and makes no distinction as to elections mentioned in the constitution or otherwise. The court seems to have been clearly wrong from the point of view of the dictionary and even from legal reasoning. The case was largely forgotten for nearly twenty years until, in 1914, in the case of *Scown v. Czarnecki*,⁸ the Supreme Court, following its prior

7. 144 Ill. 68.

8. 264 Ill. 305.

decision, gave the right to women of voting for all officers not mentioned in the constitution.

The restricted meaning which these cases necessarily impose on the word 'election' made it necessary for the revision committee to insert an additional section into the article on Suffrage and Elections, as follows: "This article shall apply to all elections under this constitution or other law." That is merely a short way of saying, the word 'elections' *means* elections, and not something else.

It is not often that one may be dogmatic in legislative drafting, but one statement at least can be made without fear of contradiction. It is that the draftsman will make consistent and unfailing use of the dictionary, even for the simplest words. The Century, Webster's, and, especially, the monumental New Oxford, will prove his steadfast friends. He will be constantly startled to learn the variety of senses in which most words may be used, and indeed at the established meaning (which often he never knew or suspected) possessed by many words in common use. And yet always there will be found in the rich vocabulary of the English language a word fitting precisely the meaning intended. Take the word 'law' itself. It has a variety of meanings. The Oxford Dictionary gives nineteen separate, recognized, and established senses in which 'law' may be used. Even in the legal sense it may mean, first, a particular rule or principle; second, the entire body of the common law; third, a particular act or statute; fourth, both the common and statute law; and fifth, both of these and the constitution as well. In using the phrase 'established by law' or 'provided by law' the draftsman must have a care as to exactly the sense he wishes to convey.

The Century Dictionary gives ten established senses in which the word 'church' may be used. It may mean, first, an edifice; second, a particular congregation; third, the entire body of a certain sect; fourth, the entire body of Christian believers; fifth, the clerical profession in general; sixth, the ecclesiastical authority . . . and other things beside these. In section three of the article on Education, there appears the phrase "in aid of any church or sectarian purpose." In using words such as these the draftsman must have a punctilious care to seek the right use for the right word.

There is no greater authority on the use of words than Roget, the famous author of "Thesaurus of English Words and Phrases." In the admirable introduction which he wrote for that book nearly three-quarters of a century ago he said:

"The most cursory glance over the pages of a dictionary will show

that a great number of words are used in various senses, sometimes distinguished by slight shades of difference, but often diverging widely from their primary signification, and even, in some cases, bearing to it no perceptible relation. It may even happen that the very same word has two significations quite opposite to one another. This is the case with the verb 'to cleave,' which means 'to adhere tenaciously,' and also 'to separate by a blow.' 'To propugn' sometimes expresses 'to attack'; at other times 'to defend.' 'To let' is 'to hinder,' as well as 'to permit.' 'To ravel' means both to 'entangle' and 'to disentangle.' 'Shameful' and 'shameless' are nearly synonymous. 'Priceless' may either mean 'invaluable' or of 'no value.' 'Nervous' is used sometimes for 'strong' and at other times for 'weak.'"⁹

By way of conclusion, it need only be said that illustrations like those given might be continued indefinitely. Perhaps enough has been said to show that the work of revising a constitution is one of absorbing interest which requires a wide variety of information and a great deal of laborious study. If, in humility, a draftsman keeps in mind all of the decisions of his state and other states construing constitutional provisions and, in addition, keeps in mind the variety of things which have been only hinted at in this paper lying outside the strictly legal field and if, moreover, he has what advertising men speak of as a 'flare for the job,' then he may feel that he is not ill equipped.

9. Intro., p. xxiii.

DRAFTSMANSHIP OF THE CONSTITUTION OF 1870

BY WILLARD L. KING

The Illinois Constitution of 1870 was framed by some of the ablest men of that day. Fifty years' experience has proved that in actual practice it is workable. It has served as a model for the constitutions of many of the western states. Anyone, therefore, who adversely criticizes its draftsmanship must be conscious that he assumes no mean task. But a casual reading of the instrument will convince any careful lawyer that had the Convention of 1870 devoted as much care to selecting and arranging the operative words as was given to the determination of the policies sought to be expressed, a much better constitution would have been the result. The Convention of 1870 had the delusion, which unfortunately is still popular, that to draft a law is simple when the policy has once been determined.

The late Professor Henry Schofield has spoken of "our loose and long winded state constitutions."¹ The critical lawyer who reads the constitution of Illinois will agree that Professor Schofield spoke with restraint. More damnatory charges can be brought against the constitution:

1. In many places it is vague. By this is meant that the draftsman had no clear idea in mind and therefore expressed none.
2. In other places the constitution is ambiguous, i. e., it is susceptible of two or more constructions.
3. It contains many grammatical and rhetorical errors.

VAGUENESS

The Constitution of 1870 is vague in the sense that the draftsman of many of its clauses had no definite conception of their application to particular cases. This is true of the Constitution of the United States, and it is true in a measure of all written law. To imagine the effect of a given statement of law upon all the infinite variety of circumstances which may arise is to be well night omniscient. But there is no excuse for not testing the written statement of law by every possible hypothesis which the draftsman can imagine.

1. *Illinois Law Review* (1911), VI, p. 104.

The Bill of Rights of the Constitution of 1870 is particularly vague. Much of it is copied from the first ten amendments to the federal Constitution of which Thomas Jefferson was perhaps the principal proponent.^{1a} Jefferson's vagueness is forgivable when it is recalled that he had no conception of the judicial enforceability of what he wrote. It would be difficult to find more vague phrases than "due process of law," "freedom of the press," or "twice be put in jeopardy." More than a century of discussion and decision concerning these phrases has clarified only partially the concepts involved.

Perhaps there is no clause in the Bill of Rights which has given rise to a greater variety of construction than this—

"All persons shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great."²

This clause in nearly the same form appears in the constitutions of a majority of the states. The constructions which have been placed upon it are almost as numerous as the courts which have construed it. Obviously a trial judge seeking to determine whether a man charged with murder should be admitted to bail gets little aid from this language. The judge may decide that the proof is evident or the presumption great when the prisoner is proved guilty beyond a possible doubt or he may hold that if there is evidence sufficient to justify a grand jury in indicting the prisoner he should not be admitted to bail. Probably the true test is somewhere between these poles but the language of the constitution gives no indication of its whereabouts.

But the vague clauses in the Constitution of 1870 are not confined to the Bill of Rights. Section 1 of Article 11 of the constitution reads in part as follows:

"No corporation shall be created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state."

This section appears in the constitutions of eleven states but so far as can be discovered the Illinois Constitutional Convention of 1870 first conceived it. It is charitable to believe that the drafts-

1a. See Jefferson's Complete Works, Vol. 2, pp. 329, 355, 358; Vol. 3, pp. 13, 201.

2. Art. 7, sec. 2. Probably the origin of this section is the Ordinance of 1787, of which Jefferson is said to have been the draftsman. See section 14, article 2, Ordinance of 1787. But see as to authorship *Poole*, "Ordinance of 1787," pp. 9-13.

man had something definite in mind when he spoke of "charitable, educational, penal or reformatory purposes." But the clause, "which are to be and remain under the patronage and control of the State," leaves less room for generosity towards the draftsman. All corporations in a sense are under the control of the state. But when is a corporation under its patronage? The only legal definition of the word "patronage" to be found in "Words and Phrases" is that given in *Moore v. Bennett*,³ where the New York Court of Appeals held that to state that a woman is under a man's "patronage" is libelous.

Words such as "patronage" which have no definite legal sense are to be avoided in drafting. The English language is rich in words used in a transferred or figurative sense which are definable only by analogy. However effective these words may be where color or force is desired, they are vague, and must be avoided where clarity is at stake. The problem of such words in redrafting a constitution is a difficult one. Where a clause originally vague has attained a definite meaning by construction of the courts it must not be tampered with. Probably it should not be changed where it is in the course of acquiring a definite construction. But where a phrase is still as vague as when written, the present Constitutional Convention can render a real service to the state by uprooting it.

AMBIGUITY

Ambiguity is defined as "the capability of being understood in two or more ways." The phrase "eligible to office" is an ambiguous phrase often found in constitutional drafting. It may mean eligible to hold the office or it may mean eligible to be a candidate for the office. The courts are almost evenly divided as to which of these constructions is correct.⁴

The construction of this clause becomes of importance in section 5, Article 5, of the present constitution which reads in part as follows:

"Neither the Governor, Lieutenant-Governor, Auditor of Public Accounts, Secretary of State, Superintendent of Public Instruction nor Attorney General shall be eligible to any other office during the period for which he shall have been elected."

3. 48 N. Y. 472.

4. See article by *Floyd R. Mecham*, Mich. Law Rev. I, 17; 23 L. R. A. N. S. 1228, N.; 41 L. R. A. N. S. 1119, N.

If "eligible" means "eligible to be a candidate," Lieutenant Governor John Oglesby, recently a candidate for governor, was not eligible. The Supreme Court of Nebraska has recently construed this section to prevent the Lieutenant-Governor from being a candidate for governor.⁵ The debates of the Constitutional Convention of 1870 indicate that the intention was to prevent these state officers from running for other offices during their terms.⁶ But the constitution in other places contains the word "eligible" obviously used in the sense of "eligible to hold." Thus Article 5, section 2, declares that the treasurer "shall be ineligible to that office for two years next after the end of the term for which he was elected." If "eligible" means "eligible to be a candidate" this, in effect, disqualifies the treasurer for four years instead of two, and this was not the intention.

The use of the same word in different senses is a fertile source of misconstruction. To avoid such misconstruction the Committee on Phraseology and Style of the present Constitutional Convention are making a word index of the proposed constitution to insure that each word is used in the same sense throughout.

Another example of ambiguity may be found in section 1 of Article 7 which requires that a qualified elector must reside for 30 days in the election district. The words "election district" may mean precinct or may mean ward, village, city, township, school district, or any other of the political districts into which the State is divided. The Supreme Court of this state has said that these words have acquired no settled meaning.⁷ Sometimes they are used to designate a voting precinct and at times they describe a larger or a smaller district than a voting precinct. Thus in town elections the entire town is a voting district although there may be several polling places, while in the city elections the ward or precinct is the election district.⁸ Again, the framers of the Constitution of 1870 were not consistent in their choice of words, for in naming the qualifications for voters at elections to move county seats they prescribed a residence in the "election precinct" instead of in the "election district."⁹

5. *State v. Wait*, 95 Neb., 806, 1914.

6. Debates, Constitutional Convention 1870, pp. 773-4.

7. *People v. Markiewics*, 225 Ill. 563 (1907).

8. *People v. Markiewics*, *supra*; *Fahey v. City of Bloomington*, 268 Ill. 386 (1915).

9. Article 10, sec. 4, Constitution 1870.

ERRORS IN GRAMMAR AND RHETORIC

The Constitution of 1870 splits infinitives! The most atrocious example of this is in the oath prescribed for members of the General Assembly, which reads in part as follows:

"I do solemnly swear . . . that I have not, knowingly or intentionally, paid or contributed anything, or made any promise in the nature of a bribe, *to directly or indirectly influence* any vote at the election at which I was chosen." (Article 4, Section 5.)

Even the apologists for the split infinitive will admit that there is a vast difference between this specimen and the occasional lapses of such writers as Herbert Spencer and Walter Pater.

Another error in the Constitution of 1870 is the consistent use of the relative pronoun "which" as a demonstrative. Thus section 2 of Article 13 of the present constitution reads in part as follows:

"The owner, lessee or manager of each and every public warehouse situated in any town or city of not less than 100,000 inhabitants, shall make weekly statements under oath, before some officer to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, *which statement* shall correctly set forth, etc."

This usage is common among lawyers who thus secure certainty at the expense of elegance and the rules of grammar. Usually the sentence can be recast so that the relative pronoun immediately follows its antecedent. If this cannot be done the draftsman should divide the sentence.

Another barbarism which occurs many times in the present constitution in the use of the adjective "same" as a pronoun. For example Article 13, section 5, reads in part as follows:

"All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the *same* to any consignee thereof, etc."

Article 13, section 3, reads:

"The owners of property stored in any warehouse, or holder of a receipt for the *same*, shall always be at liberty to examine such property stored."

This is not only forbidden by good usage but it leads to misconstruction. The word "same" when used as a pronoun has neither number nor gender and the number and gender of a pronoun are sometimes of great aid in determining its antecedent. Thus sec-

tion 1 of Article 2 of the Constitution of the United States reads in part as follows:

"In case of the removal of the president from office, or his death, resignation, or inability to discharge the powers and duties of the said office, the *same* shall devolve on the vice-president."

This clause at one time gave rise to a dispute as to whether the powers and duties should devolve upon the Vice-President or whether the office should devolve upon him, i. e., whether he should act as President or be President. Obviously if the words "the same" had been the proper pronoun "it" there would have been no ambiguity.

It would not be right in closing this article to leave the impression that the Constitution of Illinois is worse, as regards draftsmanship, than other constitutions. It is not so prolix as the constitution of Oklahoma. There are more ludicrous errors in other state constitutions.¹⁰ In general, it is probably better phrased than are the constitutions of most of the western states.

The first opportunity in fifty years is now presented to improve the phraseology and style of the Illinois Constitution. The first Constitutional Convention since 1870 is now in session. The Convention has recognized the importance of infinite pains in the work of revision and an able committee is now engaged in that work. It would be folly to hope that this committee will draft a perfect constitution. But their work will not deserve the favorable consideration of the voters unless they have preserved the capital invested by the past generation in construing the Constitution of 1870, and have eliminated its verbosity, vagueness, ambiguity, and barbarisms.

10. See for example Constitution of Colorado, sec. 3, art. 7: "The General Assembly may prescribe, by law, an educational qualification for electors, but no such law shall take effect prior to the year of our Lord, one thousand eight hundred and ninety (1890), and no qualified elector shall be thereby disqualified."

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COMMENT ON RECENT CASES

EVIDENCE—HUSBAND INCOMPETENT TO TESTIFY FOR WIFE IN A CRIMINAL CASE.—And it is still law in Illinois that wife or husband cannot be admitted to testify on behalf of each other in a criminal case! One hundred years have elapsed since Bentham fulminated. Twenty years have passed since England threw down the last bars to such testimony. And still in this state, and many others, preening themselves on their advanced civilization, this unjust relic of medieval methods is preserved.

In *People v. Holtz*, Ill. 128 N. E. 341, Oct. 8, 1920, a double murder had been attempted. In the house of H, Mr. and Mrs. H, and Mr. and Mrs. W occupied rooms. In the night of Aug. 9, 1919, shots were fired which killed Mr. W and wounded Mr. H. The two wives were tried for the murder of W and were found guilty. On the trial H was called for Mrs. W; his testimony would have exonerated both Mrs. W and Mrs. H, but it was excluded, and the Supreme Court affirms this ruling.

It was plain in the first place, under the benighted statute of this state, that H could not testify on behalf of his wife, Mrs. H. That is, of course, the fundamental badness of the law. Just why it is bad, is not worth arguing. A great deal of sentimentality is nowadays poured out on certain attenuated injustices of the law, but no one seems to care to invoke legislative remedy for this particular injustice.

But, secondly, since H could be called on behalf of Mrs. W, not his wife, but jointly tried with his wife, would not his competence for Mrs. W override his incompetence for Mrs. H? Yes, it would seem, if the Supreme Court was really seeking for loopholes to escape the injustice of the law. But the opposite conclusion was reached. The ruling follows the principle of *People v. Gillespie*, 176 Ill. 238, 52 N. E. 250 (1898). Yet it is a pity that our court cannot at least give justice a boost over the statutory wall when the opportunity offers.

Other courts and states still permit this relic of antiquity to disfigure their law; e. g., Oklahoma (*Birdwell v. U. S.*, Okl. G. App., 135 Pac. 445). Vermont, too, was in this list until recently (*State v. Sargood*, 77 Vt. 80, 58 Att. 971); but by Gen. Laws 1917, 2254, Vermont now emerges into modernism.

What will the Illinois Legislature of 1921 do in the premises?

J. H. W.

PROPERTY—ESTATES—‘DIE WITHOUT CHILDREN OR DESCENDANTS OF SUCH.’—The rule is a familiar one that the courts will construe a limitation in real property, so as to vest a fee simple interest absolute at the earliest possible moment (*Lynn v. Worthington*, 266 Ill. 416-417; *Jacobs v. Dictz*, 260 Ill. 102; *Jones v. Neillen*, 283 Ill. 356). Equally well recognized is the rule that intention prevails in the construction of wills, to such extent, indeed, as to call forth the oft-repeated expression, that one case of construction of wills is not necessarily a precedent for the construction of another similar will (*O'Hare v. Johnston*, 273 Ill. 465; *Alford v. Bennett*, 279 Ill. 385; *Smith v. Garber*, 286 Ill. 74; *Murrie v. Gruenewald*, 289 Ill. 473; *Kern v. Kern*, 293 Ill. 255). And hand in hand with the two considerations should be noted the further one that every word of a will should be given meaning if possible (*Jones v. Miller*, 283 Ill. 353).

Thus fortified, one is prepared easily to understand the conclusion arrived at in the very recent case of *Beatty v. Callis*, 294 Ill. 424, 128 N. E. 547, where, in a will, X, the testator, devised certain prop-

erty to A, his wife, for life and then to B, his grandchild, but if B should be under twenty-one years of age at the death of A, then to a trustee for the benefit of B; and if B die before A "*or subsequent thereto, leaving her surviving no child or descendants of such*" (the italics are supplied) then over.

The court paid due regard to the rule that the law favors the vesting of an estate at the earliest moment and will give the fee simple absolute to the first taker, and by its attitude implies, it would seem, that if the above quoted language had omitted the words: "descendants of such," the application of that rule would have called for a construction of the above limitation as meaning that unless B died without a child surviving her, before she (B) became twenty-one years of age, the estate could go to her in fee simple absolute.

As it was, B was four years of age at the death of the testator and died at the age of twenty-six years, leaving a husband but no children. Applying the rule of intention, and giving effect to every word, the court faced the impossibility of B having a descendant of a child before she attained the age of twenty-one years, and was by force of that impossibility impelled to conclude the intention of the testator was that the limitation over should take effect if B died at *any time*, leaving surviving her no child or descendants of a child.

In another case, also very recent, the limitation was X, the testator, to A for life, then to the "bodily heirs" of B, C, D, E, F, and G, children of A. In determining the meaning of "bodily heirs," the court was influenced by the consideration that to give the words their technical meaning would result in intestacy if A pre-deceased her children, and therefore gave "bodily heirs," the meaning of children (*Jones v. Miller*, 283 Ill. 353). The reasonableness of the rule of intention as thus applied, must be obvious. E. M. L.

ILLINOIS CAPITAL STOCK TAX.—In *People v. St. Louis Bridge Co.*, 291 Ill. 95, 125 N. E. 752, the Supreme Court had under consideration a capital stock tax assessed against the St. Louis Merchants Bridge Co. and also the real estate tax assessed against the same company, upon which the amount of capital stock tax largely depended.

The St. Louis Merchants Bridge Co. was a corporation of Illinois and owned a bridge across the Mississippi River, which was used under a lease by the Madison, Illinois & St. Louis Railway Company. The rental in this lease was provided to be the annual interest charge of \$120,000 upon the bond issue of the bridge company amounting to \$2,000,000 plus taxes and repairs, and three-fourths of the net income to be derived from the use of the bridge. Another railroad was organized in Missouri for the purpose of connecting with the west end of the bridge, and the stock of the bridge company, the Madison Railway Co. and the St. Louis Railway Co. was all owned by the Terminal Railroad Association of St. Louis, and all of the capital stock of the Terminal Railroad Association was divided among and owned by fifteen trunk railways. The

bridge was operated on the basis of charges fixed to produce only the cost of operation, and therefore no earnings accrued in addition to the charges for interest, taxes, and repairs, but whatever value there was in the use of the bridge was gained entirely through the terminal association by the above mentioned trunk lines.

The original cost of the bridge was \$2,000,000, and half of the bridge and 23.33 acres of land in Illinois were assessed for taxation in 1916 at \$1,560,000, a considerable increase over the assessment for previous years. The company showed by experts that the bridge and approaches could be reproduced for \$2,000,000 and that since its construction it had depreciated about 20 per cent, leaving in Illinois a full value of \$800,000, in addition to the value of tracks, \$40,000, and real estate \$46,660. It was shown that in the assessment of property generally the full value was fixed at 70 per cent of the actual value, which, under the company's figures, would thus make the full value \$620,662. But the court held that the bridge itself had no market value, and that therefore its earning power was an important element in determining its actual value; and that there was no evidence tending to show that the consideration for the lease was a fair value for the use of the bridge when it was purposely so used as to produce no net income. The court found that very large numbers of cars were carried over the bridge each year, and that this traffic was equal to that over the Eads Bridge, which was assessed in Illinois at \$3,500,000. Therefore the court allowed the assessment of \$1,560,000 on the tangible property to stand since no fraud was found in it.

It was also urged that the capital stock tax of 1917 was fraudulently assessed. For that year the full value of the tangible property was fixed at \$700,000.¹ The capital stock of the bridge company was all owned, as above stated, by another corporation and had never been sold for any valuable consideration, and had no market value. The capital stock committee of the State Board of Equalization made its report, in which the full value of the capital stock and franchises was fixed at \$4,600,000—the assessed value at one-third of that amount (\$1,533,335). From this the equalized value of the tangible property amounting to \$933,335¹ was deducted; and the assessment of the capital stock including franchise was thus fixed at \$600,000.

There was no specific evidence of fraud proven. Some complaint was made about the suspension of a rule by the Board of Equalization to the effect that assessments of capital stock should lie over two days for inspection with the members of the board, but it was held that the board had the right to suspend this rule, and that the values themselves did not prove fraud; that the record furnished no sufficient basis for determining the earning capacity of the bridge, and though dividends had never been paid, and no stock ever sold, the value of the service rendered to the railway companies may have been equivalent to payment of substantial

1. The figures are correctly taken from the opinion of the court but seem clearly inconsistent.

dividends. It did not appear upon what evidence the report of the committee was based except that offered by the bridge company; nor did it appear what investigation or knowledge was possessed by members of the board who thus fixed the total value of the tangible property, capital stock and franchise of this company at much more than twice the amount it would have cost to build the whole bridge and to acquire the necessary real estate. Assuming as correct the above figure of \$933,335 for the assessed value of the tangible property, the full value of the tangible property alone (assessed in 1917 by the local assessor) must have been \$2,800,000, and therefore both the local assessor in fixing the value of the tangible property and the State Board of Equalization in assessing the capital stock, took into account the supposed earning capacity of the tangible property in arriving at its value for taxation. But the assessments were both sustained—fraud not having been shown, in the opinion of the court.

The case illustrates one difficulty of properly assessing the capital stock tax in Illinois. It was due here to the peculiar situation of a subsidiary corporation, where the value of its shares could not well be ascertained; and the result may or may not have worked a serious injustice. The same situation, however, may frequently exist as between a holding company and its subsidiary, and in such cases the proper assessment of the capital stock tax must always be difficult.

In many other cases the capital stock tax works out to be an excessive burden. And the fact that this tax must be met is one of the greatest drawbacks to the incorporation of companies in Illinois at the present time. An obvious instance of the hardship of this tax is found in its application to building corporations. If an individual purchases land for \$500,000 and erects a building costing \$1,000,000, and retains the title individually to both land and building, the only tax he pays is on the assessed value of the land and the assessed value of the building. This assessed value is rarely based on the full value of the land or the original cost of the building. In some cases the full value of the land as fixed by the assessor may be almost, if not quite, its actual value, but the full value of buildings as fixed by the assessor is well known to be lower than their original cost, even when no depreciation has accrued.

If the same individual organizes a corporation, and has it take the title, with a capital stock equal to the amount of money invested, he will pay a tax not only on the assessed value of the land and on the building, but also a tax upon the assessed value of capital stock, which will probably be the difference between the full value of the land and building, as fixed by the assessor, and their original cost. This assumes that the land and building retain a value, on account of their earning capacity, equal to the amount paid for them. So that when a corporation is formed it is of no theoretical advantage to the company that a low assessment is placed upon the land or the building, for the lower the amount of such an assessment the greater becomes the capital stock assessment. And the corporation

method results in much greater taxes in any case, especially where the net rentals continue as good as in the beginning, and the capital stock value does not therefore decline.

Nor does the fact that the shares of capital stock are exempt from taxation in the hands of their individual owners ordinarily compensate for the payment of the capital stock tax by the corporation. Theoretically, this compensation would exist provided the owners of the stock are residents of Illinois; but practically shares of stock in the hands of individuals escape taxation so readily that this advantage does not offer any real inducement to those who are considering whether they will incorporate in Illinois or elsewhere.

But it may be urged that since the assessment of personal property taxes against an individual does not ordinarily include all of the taxable capital stock owned by him, so the capital stock tax in practice is not fixed with strictness, and is, therefore, not a serious burden. This has undoubtedly been true in many instances. The case of *State Board of Equalization v. People*, 191 Ill. 528, is indicative of the fact that the practice in 1901, before the writ of mandamus issued in that case, was very lenient toward the large number of local transportation companies which were there involved, and no doubt even since this decision the ordinary inconspicuous company is not severely dealt with by the state in this regard. But the creation of the new State Tax Commission, and fact that the records of all corporations are so easily obtained, makes it probable that the capital stock tax will be more and more rigidly enforced whether personal property taxes are more rigidly enforced or not. At all events any persons proposing to incorporate in Illinois will find this tax a most serious consideration and should carefully consider whether in view of the character of business to be done a burden which is likely to be so extensive can safely be assumed.

Two technical matters relating to the capital stock tax, but not brought out in the principal case, should be mentioned. The statute provides that the capital stock of all companies, except those assessed by the local assessors, shall be so valued by the State Board of Equalization (now the Tax Commission) as to ascertain the fair cash value of the capital stock, including the franchise, above the assessed value of the tangible property. And the statute gives the board the power to adopt rules for ascertaining such value. On this provision the question immediately arises as to whether or not the State Board of Equalization is directed to deduct the *assessed* value of the tangible property from the *full* value of the capital stock, including the franchise, or whether the *assessed* value of the tangible property is to be deducted from the *assessed* value of the capital stock and franchise; the difference between these two methods being obviously very great. The rules of the State Board of Equalization apparently settle this question in favor of the latter method, for these rules provide that the fair cash value of the shares of stock be added to the debt; that the board shall then "equalize" said amount so obtained so that the companies

shall be assessed upon a uniform basis with other property throughout the state. And since the statute provides that the Tax Commission shall be an "equalizing authority" and shall equalize assessed values of capital (Hurd's Rev. Stat., 1919, Ch. 120, sec. 294s) the amount so ascertained must be an assessed value and not a full value for the capital stock and franchise. From the amount so determined the rules provide that the assessed value of the tangible property is to be deducted. It should, however, be noticed that in the old rules of the Board of Equalization quoted in *State Board of Equalization v. People*, 191 Ill. 528, the matter of equalization was omitted, as it is omitted in the statute, and under those rules strictly interpreted the *assessed* value of the tangible property would be deducted from the *full* value of the capital stock and franchise. And yet in the same case in which the above old rules are quoted the figures given indicate that the assessed value of the capital stock was, as a matter of practice under those rules, taken by the board as its first figure rather than the full value of the capital stock and franchise. In *Hub v. Hanberg*, 211 Ill. 43, 44, assessed values were also clearly taken; but in *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556, 558, it seems equally clear that assessed value was taken from full value. But the exact question is not considered in any case which has reached our Supreme Court, and the blank forms used for report of capital stock tax make no provision on their face for taking any value of the capital stock and franchise except the full value; the reason no doubt being due to the fact that the assessed (or the full) value is taken for both figures as a matter of practice. For it is obvious that the use of the full value of the capital stock and franchise and the assessed value of the tangible property would work great hardships and would be a method of double taxation not contemplated by the law.

The other technical question above referred to relates to the adding of the debt to the value of the shares in order to ascertain the amount from which the assessed value of the tangible property is deducted. To add these values together (i. e., the debt and the market or actual value of the shares of stock) seems *prima facie* to create a much greater value than what would be fair and equitable. But this subject has received the attention of our Supreme Court in various decisions and was specially considered in the above leading case of *State Board of Equalization v. People*, 191 Ill. 528, and other cases cited in that decision. An explanation of the theory by which this may properly be done is given on page 547 of the above leading case, and this method is now well established as the law of this state, though the working out of the method in various corporations must be done with care in order to avoid overtaxation.²

W. B. H.

INTERNATIONAL LAW—ALIENS—RIGHT OF ALIEN FRIENDS AND ALIEN ENEMIES TO INHERIT PROPERTY UNDER TREATIES AND STATE

2. [For a further comment on the principal case, see REV. (1920), XV, 42.]

STATUTES.—In the case of *Techt v. Hughes*, 228 N. E. 185 (N. Y.), it was held that the American wife of an Austrian subject resident in the state of New York had an estate of inheritance in the property of her father, an American citizen, who died shortly after the declaration of a state of war with Austria. In so holding the court decided that the convention between the United States and Austria of May 8 1848, which extended the stipulations of the treaty of commerce and navigation of August 27, 1829, and which gave Austrian subjects the power to inherit real property under certain conditions had not been abrogated by war between the United States and Austria.

One cannot read this decision without appreciating that the court felt that to hold that persons such as the plaintiff were not entitled to take property by descent would work a grave injustice to a very large number of American women who had changed their nationality by reason of their marriage, yet continued to reside here and remained loyal to the cause of the United States. The mere statement of the facts impels one to decide that this class of persons should not be deprived of their right to inherit property in this country while resident here unless the law is so clear that such step is imperative.

The court first considered the right of an alien to inherit property by virtue of the New York statute and stated that by the express wording of this statute provision had been made (as the state had a right to provide and yet not violate or interfere with the treaty: *Blythe v. Hinckley*, 180 U. S. 333, cited in the opinion of the court, p. 190) for the descent of property to "alien friends," but there was no such provision for "alien enemies" (p. 190). It was necessary, therefore, to decide whether the plaintiff was of the first or the latter class. It no doubt was far from the intention of the New York legislature to place an American woman residing in that state in a position where she should be denied the right to inherit property of American relatives in case her husband was an alien and subject of a state with which the United States might be at war. It is believed that if this particular question had been before the Supreme Court of the United States, it would, if it followed methods which it has observed in many recent cases, have gone to great lengths to reconcile the claim of the plaintiff with the probable design of the legislature.

The court reviewed in a painstaking manner many cases that have dealt with definitions of the term "alien enemy." By reason of the fact that Austrian subjects resident here were placed within certain restricted classifications, the court concluded that the plaintiff was not an alien friend in the true sense of that term and, therefore, if the plaintiff was entitled to take by descent it must be by virtue of the treaty. Thus it was necessary to hold that the treaty with Austria had not been abrogated by the war. It is a principle of international law well recognized that whether or not such a treaty is terminated depends upon the decision of the executive or political department of the government and not the decision

of the courts. The embarrassment that might be occasioned by reason of this decision becomes evident when one realizes that the state department may, in the exercise of executive functions, announce that it considers this treaty as not in force. The court felt, however, that since there had been no statement by the political department as to whether or not this treaty was abrogated, the court should decide the question (p. 193), and did so on the theory that some treaties were absolutely cut off by the war, that is, those of alliance, those not relating to war, or treaties not affecting vested rights (authorities cited p. 191), but that there was nothing in the provisions of this treaty which made its termination necessary by the mere fact of war. The court drew many analogies from the war legislation of Congress. Reference was made also to privileges granted such subjects, as to the right to sue (*Porter v. Freudenberg*, 1915, 1 K. B. 857, and cases cited in the opinion at page 187). There are many decisions on such points in this country as well as in England. In brief, these cases point to the fact that while one may be technically an alien enemy, he is not practically to be deemed such for numerous purposes. It seems, however, that the court failed to distinguish that these decisions are based upon rights that are granted independent from any stipulations or guaranty of treaties, that is, such rights are based upon the authority of the executive to extend them privileges or to place them in restricted classifications by reason of section 4046 of the United States Statutes, and that the privileges are extended by reason of the person's good behavior. Does it not seem, therefore, that these analogies of the court might have had better application in throwing light on the construction of the statute than in indicating the condition of the treaty?

In limiting the decision to the right of the plaintiff to take property by descent by virtue of the Austrian Convention—holding the same to be in full force and effect—the court took a dangerous stand for the reason that it is highly improbable that the political department of the government would agree with this position in view of the almost universal practice of nations in allowing the victorious state to stipulate what treaties it desires to have renewed. This procedure was followed in the Treaty of Versailles. Since the views of the state department would have been acknowledged to control, it would seem to have been the part of prudence for the court to have insisted on being officially advised through the efforts of counsel as to the position of the department.

Regardless of these facts it is believed that the decision of the court is proper, but based upon a ground that was unnecessary. In deciding whether or not the plaintiff was an alien friend or an alien enemy, it was not necessary to go into the history of these terms for the reason that the Trading with Enemy Act (U. S. Rev. Stat. 1919, sec. 3115 1-2 A-J) stipulated precisely as to what persons were to be considered alien enemies, and did not include therein persons in the position of the plaintiff in this case. In other words, an American citizen resident in Germany or Austria would be considered for certain purposes as an enemy, whereas a party in the

position of the plaintiff, resident in this country, would not be considered an alien enemy although under other United States Statutes they might have restrictions placed upon them. The court considered the definition of the term enemy as given in this act, but held that the act gave such definitions only in determining who was an enemy or a friend for the purpose of trade or commerce. It must be noted, however, that Congress did not so limit the application of the term as the act expressly provided for taking over the property of such parties as were termed enemies and for placing it in the hands of the Alien Property Custodian, establishing thereby a trust fund in favor of the enemy subjects.

Thus it may be seen that the plaintiff was not within the class of alien enemies, and, therefore, as an alien friend (under the court's own interpretation of the New York statutes) was entitled to an estate of inheritance to the property in question.

CHARLES H. WATSON.

WATER RIGHTS—SURFACE WATERS—DRAINAGE—NATURAL WATERCOURSE.—The case of *Inlet Swamp District v. Melhausen*, 291 Ill. 459, 126 N. E. 113, just decided, taken with the earlier case of *Winhold v. Finch*, 286 Ill. 616, suggests a distinction to be observed in the definition of *natural watercourse*, between the application of that term as employed in relation to streams and that as applied to surface water.

It should be noted that the Supreme Court had occasion in the case of *People v. Bridges*, 142 Ill. 37, to define watercourse, in its application to a stream, and there considered that one of the ear-marks was that of a definite channel. The case of *Town of Bois D'Arc v. Convery*, 255 Ill. 514, indicates that no definite channel is necessary, or in fact usual, in the definition of the term 'watercourse' as applied to surface water. The test of a natural watercourse as there set up would seem to be one of direction taken by the surface water in its course from the dominant estate to the servient estate, and if the surface water naturally flows off the servient estate in a definite direction, the definition of a natural watercourse seem to be satisfied. The distinction between stream and surface water is observed in that case by these words:

"While there may not have been a stream at that point across the appellant's land with well-defined banks and a bed, or the water may not have flowed across appellant's land at that point at all seasons of the year, that was not necessary. . . . 'If the conformation of the land was such as to give surface water flowing from one tract to another a fixed and determinate course, so as to uniformly discharge it upon the servient estate at a fixed and definite point, the course, thus uniformly followed by the water in its flow is a water course, within the meaning applicable to this class of cases.'"

The importance of the identity of the flow of surface water as in a natural watercourse, is important only in so far as that term identifies it as in the natural course of drainage, for if it be established that surface water flows in a certain direction in the

natural course of drainage, the servient owner cannot obstruct it, as he sought to do in the cases of *Bois D'Arc v. Convery*, and *Winhold v. Finch*, above, nor can the dominant estate be drawn into a drainage district by virtue of the servient estate becoming part of such district (*Gar Creek Drain Dist. v. Wagner* (256 Ill. 343), as was attempted in the principal case. E. M. L.

WATERS — SURFACE WATERS — DRAINAGE — OBLIGATION TO BUILD NEW BRIDGE TO ACCOMMODATE ENLARGED CHANNEL.—The case of *People v. Peeler*, 290 Ill. 459, 125 N. E. 306, recalls a question that arose in connection with the case of *C. B. & Q. R. Co. v. Illinois*, 200 U. S. 561. In the latter case, a farm drainage board in the course of its operations swelled a natural stream (creek) by facilitating the course of surface water that naturally drained into the creek to such an extent that a railroad bridge over that creek was no longer large enough to accommodate the stream. The court held the railroad was bound to anticipate not only present, but also future requirements in the structure of its bridge; that in view of such obligation the bridge constructed by it was inadequate and not such as should have been constructed and thus an obstruction, and it could be compelled at its own cost to install a bridge large enough to accommodate the increased flow of the stream (REVIEW, VIII, 326; XI, 212). The question was this: Was a railroad company required to anticipate more than the swelling of the stream caused by bringing waters into it in the natural course of drainage, that otherwise stood on the dominant lands until they evaporated or seeped into the ground? In other words, what was the situation where a farm drainage district carried waters out of their course of natural drainage into the stream and thus swelled the stream? Would the railroad still be charged with anticipating such contingency and be required to build a larger bridge at its own expense?

It was seen that if a drainage district built a new channel, it could not compel the railroad to bridge that at its own expense (*East Side Dist. v. E. St. L. C. & W. R. Co.*, 279 Ill. 366). And it would seem that the authorities consider a railroad in that respect like any owner of land, and that a railroad could claim compensation for any act of eminent domain whereby its property was taken or damaged, so that an act, which, by causing water to flow in a stream out of its natural course, renders useless a bridge properly constructed to take care of all the surface water that the land is bound to care for (i e., all water in the natural course of drainage), would be taking property for which compensation ought to be made (*Peck v. Herrington*, 109 Ill. 611; *Drainage Dist. v. Drainage Dist.*, 130 Ill. 261; *Helm v. Richmond*, 72 Ill. App. 516; *C. B. & Q. R. Co. v. Grimwood*, 212 Ill. 103; *Shaw v. San. Dist.*, 267 Ill. 216-218).

That would seem to call for an answer to the question thus raised, against any obligation of the railroad to build a bridge to accommodate any surface water introduced into the stream out of the natural course of drainage. And that would seem to be

the sense of the principal case (290 Ill. 455). The language of the principal case as to the power of the legislature to compel a railroad to build bridges over channels constructed by drainage districts in natural depressions, doubtless intends to go no further than to require such bridges only to the extent that the surface water thereby accommodated is in the natural course of drainage. Even here, the legislature cannot require a road district (town) to build a new bridge. That is a matter of township affairs and were the legislature to compel such action it would impose a debt on the town without the town's consent, contrary to the constitution.

The interesting angle in the case, however, is seen in the nature of the proceeding that produced the case under discussion. The litigation had its inception when a highway commissioner of a road district filed a petition in mandamus against the drainage commissioners to compel them not only to build bridges across the ditches of the drainage district, but also forever to maintain and keep them in repair. Having made useless the old bridges, the drainage district could be compelled to replace them, otherwise the legislature, by authorizing the removal of the old bridges without replacing them, would thereby be imposing an obligation on the town without its consent. But as to the obligation to maintain the bridges once they were constructed, that remained the same whether as to old bridges or the new bridges, and, therefore, was not affected by the act of the legislature, acting through the drainage authorities in removing the old bridges. This would seem reasonable in the light of the authorities.

E. M. L.

STREAMS—ALTERATION OF COURSE BY RIPARIAN OWNER.—The case of *Dettmer v. Ill. Terminal R. Co.*, 287 Ill. 521-522, 123 N. E. 37, furnishes an interesting development of the rule observed by the American authorities that a riparian owner owning on both sides of a stream may alter the course of that stream within the confines of his own land if he returns it to its course before it leaves his land: *REVIEW*, VI, 385-386.

The development referred to consists in this: that where an owner does so alter the course of a stream, a drainage district seeking to avail itself of the stream in facilitating the natural course of drainage, as by deepening or widening the channel, cannot insist upon following the old course through that owner's land, but must follow the new one, unless that is incapable of accommodating the drainage.

E. M. L.

RECENT CASES

[Contributed by the Undergraduate Class]

ADMIRALTY—EFFECT OF STATE STATUTES ON JURISDICTION.—In *Earles v. Howard*, 268 Fed. 94, in admiralty, the court entertained a libel in personam to recover for instantaneous death resulting from a maritime tort. The tort occurred in Maine, which has a statute creating a right of action for instantaneous death resulting from negligence. Here, although previously there was no right of action in admiralty for such a tort, the federal court, sitting in admiralty, took jurisdiction of a cause of action created by virtue of the statute of Maine.

ARREST—COMMITMENT WITHOUT WARRANT—HABEAS CORPUS.—In view of the popular clamor of the abuse of the writ of habeas corpus, the case of *ex parte Harvell*, 267 Fed. 997, gives an interesting summary of the power of a federal agent to arrest a person for a felony, without warrant, and to commit him to jail without a hearing. An agent of the Department of Justice arrested Harvell, without a warrant, for an alleged violation of the Mann Act, and without taking him before a judicial officer for a hearing, issued a mittimus addressed to the keeper of a county jail, in which it stated that Harvell, a United States prisoner, was remanded to his custody.

Although in case of necessity an officer may arrest without warrant, yet the duty is imperative upon the officer—

“to forthwith carry the person arrested before the nearest judicial officer having jurisdiction to hear and determine the legality of such arrest, to issue a warrant upon affidavit setting forth the substance of the offense charged and the substantial and material features thereof.”

Connor, District J., delivering the opinion of the court, passes judgment upon the facts as disclosed in the forceful statement—

“Such disregard of essential provisions of criminal procedure, resulting in imprisonment of a citizen, without being informed of the cause of his imprisonment or an opportunity to be heard in his defense, indicates a degree of ignorance or disregard of law difficult to account for and without justification or excuse.”

The writ of habeas corpus was granted.

ATTRACTIVE NUISANCE—DUTY OF OWNERS TO PROTECT CHILDREN THAT MAY BE ATTRACTED TO A DANGEROUS AGENCY ON THEIR LAND.—The so-called “attractive nuisance” doctrine as applied to liability for injury to children by dangerous agencies on private property to which they have been attracted, is considered in the case of *Hardy v. Missouri Pacific R. Co.*, 266 Fed. 860. As the court says—

"No legal proposition has more thoroughly divided the courts of different jurisdictions than has the recognition or application of the doctrine here involved."

In this case the defendant had erected a quadrangular concrete conduit about six feet high and wide and about 700 feet long. No obstructions or warnings were placed at either entrance. Near the center of the conduit, waste steam and hot water were discharged from the powerhouse boilers at intervals into the conduit. The deceased, a boy twelve years old, was killed by hot water and steam while going through the conduit with two companions. It was shown that at least three boys in the course of four years had gone through the conduit, but not to the defendant's knowledge.

In holding the defendant not guilty of negligence, the court held that there must be a "reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from danger." Although an owner is liable for an injury that could be anticipated, "anticipation in the meaning of this doctrine means probability, not possibility."

EQUITABLE RELIEF—FRAUD—POWER OF FEDERAL COURT TO ENJOIN JUDGMENT IN STATE COURT.—The suit of *Chicago, R. I. & P. R. Co. v. Callicotte*, 267 Fed. 799, was brought by the plaintiff asking an injunction against the enforcement of a judgment at law, recovered by the defendant in an action on personal injuries tried in a state court. The facts in the former litigation were briefly these: Callicotte feigned total paralysis of his legs, and testified falsely that the injury was permanent. By a conspiracy with others, a fabricated history of the case was produced, and the result was that expert medical witnesses were deceived, and also testified that the injury was permanent. These facts could not, by diligence of any manner, have been discovered by the railroad company until after the judgment at law.

The court decided that under these circumstances, a court of equity would restrain the enforcement of the judgment on the ground of fraud. The basic reason for the decision, and the ground on which the court rested its opinion, was that such relief lies, where fraud, extrinsic or collateral to the matter tried by the first court, is shown, even though it will not lie where there was fraud as to the matter on which the decree was rendered. Such relief might not be given where the fraud attacked was simple perjury (*Ross v. Wood*, 70 N. Y. 8, 12), or where the fraud on the plaintiff was practiced by a third party and not the defendant (*Hudgens v. Baugh*, 225 Fed. 899). It would seem that the crux of the principal case is the element of conspiracy as to the whole history of the litigation, which puts the fraud on an extrinsic or collateral basis.

Having decided that the case warranted the injunction, the court further held that the fact that the judgment was rendered in the state court was not material, since the injunction acts, not on the court giving judgment, but on the party.

EVIDENCE—BURDEN OF PROOF—RISK OF NON-PERSUASION.—In *Donovan v. St. Joseph's Home* (1920), 295 Ill. 125, 129 N. E. 1, the controversy arose over a contested will, contestant attacking its validity on grounds of continuous unsoundness of mind immediately preceding and after execution of will, and on lack of testamentary capacity in general. The testator was ninety-seven years of age. The trial court at the request of proponent, after evidence was in, gave the jury the following instruction:

"You are instructed that the law presumes every person of legal age to have sufficient mind and memory to make a valid will and casts upon those who contest a will the burden of proving by the greater weight of evidence that the person seeking to make the will was not at the time of a sufficient sound mind to make a valid will."

Cartwright, C. J., reversing this decision and the affirmance in the Appellate Court, and holding this instruction improper, said in the course of his opinion:

"It is perhaps quite natural that there should be some misunderstanding as to the application of the general presumption of sanity in the case of the contest of a will in chancery arising from the double meaning of the term 'burden of proof' and its application to a case of that kind. The term . . . is used with different meanings. In one sense it expresses the burden of the party who has the affirmative of the issue and must ultimately establish such affirmative, but in another sense the term expresses the duty of a party to offer evidence at any particular stage in order to prevent an adverse judgment . . . In view of the different meanings attached to the term, it seems advisable to bring together the decisions on the subject relating to the contest of wills, etc."

The trial court erred in its application of the proper meaning of the term 'burden of proof.' This same error occurred in the Appellate Court. Cartwright, C. J., analyzes and expressly sets forth the double aspect of the phrase. To have differentiated and labeled each meaning of this troublesome term would have settled the position of each, and would have lent itself to clarity of thought in the classification of these two ideas. The court had not far to search to find the separation and tabulation completed. Dean Wigmore, in his work on Evidence (Vol. IV, sec. 2485 et seq.), treats this question of the conflicting aspects of the term 'burden of proof' and coins a phrase, quite apropos of one of its meanings, thus differentiating it forever from its Siamese twin. For that which Cartwright, C. J., has called the "affirmative of the issue," Dean Wigmore has substituted the phrase "the risk of non-persuasion," which never shifts from the proponent in such cases. For the "burden of proof," which Cartwright, C. J., states "shifts in order to prevent an adverse judgment," Dean Wigmore has retained the old phrase.

Had the term 'burden of proof' been employed by the trial court when it spoke of the duty of a party to go on with the evidence in a particular stage of the trial, retaining the phrase, 'risk of non-persuasion,' for the affirmative of the issue, the ultimate

convincing of the jury by a preponderance of evidence, it is submitted the error for which the above was reversed would probably not have been committed. Instead of speaking, as the court does, in *Egbers v. Egbers* (177 id. 82), of "the burden of proof in the sense of producing evidence," passing from one side to the other, and of 'the burden of proof'—meaning the obligation to establish the truth of the claim by a preponderance of evidence, resting throughout on the affirmative, and finding it necessary to throw in the explanatory rider each time the troublesome term is employed, had the court used the term 'risk of non-persuasion' as contrasted with 'burden of proof,' the result, besides being clearer and much more explicit, would have materially mitigated, if not wiped away entirely, the possibility of future ambiguity and error.

SALES—CONTRACTS—INTERPRETATION OF CONTRACT BETWEEN DEALER AND CONSUMER.—*Producers Coke Co. v. McKeefery Iron Co.*, 267 Fed. 22, had to deal with the interpretation of a contract for the sale of coke between a consumer, the plaintiff, and a dealer, the defendant. It is of the essence to note that the defendant was in no sense a producer of coke but functioned only by buying and selling. That is, his method was to get a sales contract with a consumer and then comply with it by means of a covering contract with the producer. The contract contained the usual stipulations as to the delivery of so many tons per month at a fixed price, etc., and in addition, this clause on which the case hinged: "It is understood and agreed that if there should be a shortage of cars, shipments shall be divided from time to time in fair proportion on all orders."

A shortage of cars and a general tightening of the coke market occurred simultaneously with a rise in the price of coke. Under these conditions there was no dispute that the dealer made a fair division of the coke which he had contracted to buy from producers among his contracting vendees. But at the same time, the dealer took part in a great number of spot sale transactions; that is, he bought and sold coke on the market at the market price. The contention of the plaintiff vendee was that the dealer should, under the clause in the contract, have divided all his coke among those with whom he had contracts, and that the dealer was not justified in making any sales on the market (spot sales) while at the same time he reduced the amounts which he was delivering to his vendees.

The court, by a vote of two to one, upheld the contention of the plaintiff that it was entitled to recover whatever damages it might show were occasioned by these spot sales. The majority opinion refused to consider the case as unique in the coke industry, but maintained that the case hinged upon the word "all" in the above quoted clause. Since the dealer had coke in his possession, and there was no reservation in the contract as to sales on the market, the construction of the clause demanded that the dealer be required to pro rate all his supply among those with whom he had contracts.

This common law disposition of the case was repudiated by the dissenting judge, who based his opinion for the defendant upon what he termed "the grave consequences of such a holding to the great coke trade of Pennsylvania." His view of the case was that the majority opinion would mean that a broker of coke or coal could only engage in buying and selling in his business at the peril of thereby subjecting all his business operations to the domination of such a contract. That a broker's principal business was in taking advantage of a changing market, and such transactions were the well recognized custom of brokers in the trade, a custom which would be thrown into uncertainty by a decision for the plaintiff consumer.

It is submitted that although the majority opinion would have been applicable to a manufacturer selling the product of his own plant, it is incorrect, applied, as here, to a dealer doing two types of business, one of time contracts, and the other of market sales. Such a ruling, if applied to dealers in all branches of business, might well affect permanently the amount of time contracts they would make, a situation which in turn might slow down all departments of industry.

BANKS AND BANKING—PAYMENT OF CHECK ON UNAUTHORIZED ENDORSEMENT.—The case of *Fidelity Deposit Co. of Maryland v. Bank of Charleston National Banking Association*, 267 Fed. 367, decided that a bank which cashed a check on indorsement by the agent of the payee, knowing that the indorsement was unauthorized, is liable to the payee of the check for conversion of his property. The contention of the defendant that because there was no privity of contract between the payee and the drawee, no suit could be maintained against the drawee, was dismissed on the ground that the suit was one for the conversion of the plaintiff's property and on that theory the important element was not the breach of any contract by the defendant, but that it had undertaken to exercise ownership over a check which belonged to the plaintiff without its authority. The court treated the exact question as a new one in that jurisdiction, holding that all of the previous cases pressed upon it by the defendant were brought for breach of contract without showing the bank's knowledge of lack of authority in the indorser.

MILITARY LAW—JURISDICTION—POWER OF PROVOST MARSHAL DURING RIOT.—*United States v. Wolters*, 268 Fed. 69, decided an interesting question as to the jurisdiction of a provost court. Riots having broken out in Galveston, Texas, martial law was declared, and General Wolters was directed to assume command of a district embracing that city, on June 7, 1920. A later proclamation declared that the mayor and other officials had failed, and refused to keep order and to preserve the peace, and directed the commanding general to enforce order and cause the civil law to be faithfully observed. The general thereupon ordered the provost marshal to take charge of the city hall, the office of the city judge and all records, and directed that all violations of city ordinances be tried by the provost marshal. The relator was arrested for exceeding the

speed limit and was found guilty, sentenced to pay a fine, and committed to jail in default of payment. He objected to the jurisdiction of the provost court and asked for trial by jury, which was denied.

No case being in point, the court decided the case on fundamental principles, and laid down the following points:

1. In the absence of any statute in Texas conferring power upon the governor to call out the militia and enforce the laws of the state in cases of riots, he nevertheless had that power, and his suspension of the civil officers in Galveston was legal.

2. Although the relator might have been charged in a state court with violation of a state law, he nevertheless was within the jurisdiction of the city court, and was therefore within the jurisdiction of the provost court, which superseded the city court for the time being.

3. Given the jurisdiction of the provost court over the relator, this court cannot inquire into any irregularities arising in the course of the trial there.

4. The constitutional guarantee of trial by jury does not apply to state courts, and as long as due process of law is observed, it is sufficient. Trial by jury in a community under martial law is manifestly impracticable.

DIVERSITIES DE LA LEY

ANOTHER SUPREME COURT ARRIVED AT THE COUNTERCHECK QUARRELSOME.—We all know that a quarrel may be “found upon the seventh cause” (as the foolish Touchstone pointed out). It begins, indeed, with the Retort Courteous, proceeds to the Quip Modest, then the Reply Churlish, next the Reproof Valiant, which leads to the Countercheck Quarrelsome, which leads (alas! for the judicial calm) to the Lie Circumstantial, and even the Lie Direct!

We saw in a recent issue of this REVIEW that the Ohio Supreme Court has arrived at the fourth or fifth stage of this mental condition. And now, magisterial, the North Dakota Supreme Court has exhibited itself in the same stage of nervous tension, most certainly in the fifth above stage.

The opinion in *State ex rel. Lofthus, State Bank Examiner v. Langer, Attorney-General*, 177 N. W. Rep. 408 (N. D.), or rather the opinions in that case, for there are several, following each other in bewildering alternation, from each faction of the bench—indeed, they drop into the clerk's in-box like cards falling fast around a table when the play is brisk,—I have not counted the opinions, perhaps I had better stop right here and tally them, first noting merely that the respondent tried to close up a bank in Fargo, and that the issue before the Supreme Court was whether a temporary restraining order should be discharged or made permanent, and that the majority of the court were in favor of the latter decision. . . Here is the tally:

1. Bronson, J., for the *majority*, files opinion Oct. 24 (1919); Robinson, J., in concurring opinion, quoting Scripture, “I am innocent of the blood of this just man; see ye to it!”

1a. Birdzell, J., *dissents*, on Oct. 31, but expressing “respectful deference to the views of the majority.”

1b. Christianson, C. J., *concurs* in the *dissent*, and on Nov. 22 files a dissenting opinion, quoting also from the trial before Pilate, thus responding to Robinson, J.'s invocation thereof.

2. Bronson, J., now files an *Addendum*, about Nov. 24, but here passes out of the Quip Modest stage directly into the Reproof Valiant stage, “Well do the dissenting members of this court recognize and *know* that no oral testimony of any kind, etc., etc.”

2a. Birdzell, J., then files a *further dissent*, on Nov. 26. It was, to be sure, “not written to provoke further controversy.” Nevertheless, it did evoke from

3. Bronson, J., for the majority a *Second Addendum*, which alas! showed that complete self-restraint was no longer feasible; for it points out that “soon we may expect a daily edition of dissenting opinions; soon we may look for a personally conducted

debating school among the members of this court." This might be construed as a merry jest applicable to both factions, in view of its occurrence in a Second Addendum. Yet the ironical reference to the "indeed illuminating reasoning in Mr. Justice Birdzell's opinion" indicates that personal feeling rather than cynical jest was the dominant note.

From the point of view of the disinterested, perusing jurist, as well as of the North Dakota taxpayer, the suggestion seems apt that all six opinions be withdrawn, edited and consolidated, for the permanent official report, and that thus posterity be spared this display of judicial inequanimity.

J. H. W.

THE CHARACTER OF AN HONEST LAWYER.—An honest lawyer is the life-guard of our fortunes, the best collateral security for an estate; a trusty pilot, to steer one through the dangerous (and often times inevitable) ocean of contention; a true priest of justice, that neither sacrifices to fraud nor covetousness; and in this outdoes those of a higher function; that he can make people honest that are sermon-proof. He is an infallible anatomist of 'Meum' and 'Tuum,' that will presently search a cause to the quick, and find out the peccant humour, the little lurking cheat, though masked in never so fair pretenses; one that practices law, so as not to forget the gospel, but always wears a conscience as well as a gown; he weighs the cause more than gold; and if that will not bear the touch, in a generous scorn puts back the fee. Though he knows all the criticisms of his faculty, and the nice snapperadoes of practice, yet he never uses them, unless in a defensive way, to countermine the plots of knavery; for he affects not the devilish skill in out-baffing right, nor aims at the shameful glory of making a bad cause good; but with equal contempt hates the wolf's study, and the dog's eloquence; and disdains to grow great by crimes, or build himself a fortune on the spoil of the oppressed or the ruin of the widow and orphan. He has more reverence for his profession, than to debauch it to unrighteous purposes; and had rather be dumb than suffer his tongue to pimp for injustice, or club his parts, to bolster up a cheat with the legerdmain of lawcraft. He is not faced like Janus, to take a retaining fee from the plaintiff, and afterwards a back-handed bribe from the defendant; nor so double-tongued that one may purchase his pleading, and the other at the same, or a larger price, his silence; but when he undertakes a business, he espouses it in earnest and does not follow a cause, but manages it. A mollifying letter from the adversary's potent friend, a noble treat, or the remora of a lusty present from the great, have no influence to make him slacken his proceedings; for he is so zealous for his client's interest, that you may sooner divorce the sun from the ecliptic than warp him from his integrity; yet still in his patron only 'usque ad aras' (as far as just); for if once he finds the business smells rank, St. Mark's Treasure, or the Mines of Potosi, are too small a fee to engage him one step further.

As his profession is honourable, so his education has been liberal and ingenious; far different from that of some jilting petifoggers, and purse-milking law-drivers, whose breeding, like a cuckoo's, is in the nest of another trade, where they learn wrangling and knavery in their own causes, to spoil those of other men, and, with sweetened ingredients of mechanic fraud, compound themselves (though simple enough) fit instruments for villainy. But his greener years were seasoned with literature, and can give better proofs of his university learning, than his reckoning up the colleges, and boasting his name in the Buttery book; he understands logic (the method of right reasoning) and rhetoric (the art of persuasion), is well seen in history (the free school of prudence), and no stranger to the ethics and politics of the ancients. He is skilled in other languages besides Declaration Latin and Norman gibberish; he read Plato and Tully before he saw either Littleton or the Statute Book, and grounded in the principles of nature and customs of nations, came ('*lotis manibus*') to the study of our common municipal law, which he found to be '*multorum annorum opus*,' a talk that requires all the nerves of industry; and, therefore, employed his time at the Inns of Court; better than in hunting after new fashions, starting fresh mistresses, haunting the playhouses, or acquiring the other little town accomplishments, which render their admirers fine men in the opinion of fools, but egregious fops in the judgment of the wise.

In his study, he traffics not only with the infantry of epitomes, abridgments and diminutive collectors in decimo-sexto, but draws his knowledge from the original springs, digesting the whole body of the law in a laborious and regular method, but especially aims to be well-versed in the practice of every court, and rightly to understand the art of good pleading, as knowing them to be the most useful to unravel the knoty intrigues of the cause, and to reduce it to an issue; yet hates to pester the court with circuities, negative pregnants, departures, and multiplied inconveniences. He never goes about with feigned allegations to cast a mist before the eyes of justice, that she may mistake her road and assign the child to the wrong mother; endeavors not to pack a jury by his interest to the under sheriff; nor to balk an evidence with a multitude of sudden ensnaring interrogatories; nor maintains any correspondence with the Knights of Alsatia, or Ram-Alley Vouchers. He can prosecute a suit in equity without seeking to create a whirlpool, where one order shall beget another, and the poor client be swung round (like a cat before execution) from decree to rehearing, from report to exception, and vice versa, till his fortunes are ship-wrecked and himself drowned, for want of white and yellow earth to wade through on. He never studies delays to the ruin of a family for the lucre of ten groats; nor, by drilling quirks, spins out a suit more lasting than Buff, depending a whole revolution of Saturn, and entailed on the third and fourth generation. He does not play the empiric with his client, and put him on the rack to make him bleed more freely, casting him into a swoon, with frights of a judgment,

and then reviving him again with a cordial writ of error, or the dear elixir of an injunction, to keep the brangle alive as long as there are any vital spirits in the pouch. He can suffer his neighbors to live quiet about him, without perpetual alarms of actions and indictments, or conjuring up dormant titles to every commodious seat, and making land fall five years purchase, merely for lying within ten miles of him. He delights to be an arbitrator, not an incendiary, and has 'beatus pacificus' oftener in his mouth than 'currat lex.' He never wheedles any into endless suits for trifles, nor animates them to undo themselves and others for damage feasant, or insignificant trespasses 'pedibus ambulando'; but (as Telephus's sword was the best cure for the wounds it made) advises people to compose their assaults and slanders over the same ale that begot them; nor does he, in weightier cases, extort unreasonable fees; for whatever the foul-chapp'd rabble may suggest, a lawyer's profession is not mercenary; the money given him is only an honorary gratuity for his advice and trouble, or a grateful acknowledgment of our obligations for his well-intended endeavors; and the old emblem of the brambles tearing off the sheep's fleece that ran to it for shelter in a storm can have no reflection upon his, whose brain is as active and his tongue as volatile, for a pennyless pauper, as when oiled with the 'aurum potabile' of a dozen guineas. In a word, whilst he lives he is the delight of the court, the ornament of the bar, the glory of his profession, the patron of innocence, the upholder of right, the scourge of oppression, the terror of deceit, and the oracle of his country; and when death calls him to the Bar of Heaven, by a 'habeas corpus cum causis,' he finds his Judge his Advocate, non-suits the devil, obtains a liberate from all his infirmities, and continues still one of the Long Robe in Glory.

[The above sketch appears at the end of a small paper bound volume entitled "Strictures on the Lives and Characters of the Most Eminent Lawyers." The volume was published anonymously in Dublin in 1790, and is attributed to Edward Wynne, Sergeant, who published in 1765 a work entitled "Eunomous; or Dialogues Concerning the Laws and Courts of England." It is to be noted that Sergeant Wynne attributed this sketch on "The Character of An Honest Lawyer" to an anonymous author. He published it August 29, 1676.—F. B. C.]

ARE THE YELLOW CABS COMMON CARRIERS?—"The question before this court is whether the taxicab in which the plaintiff received his injury is a 'public conveyance provided by a common carrier for passenger service' within the meaning of the policy sued upon." With this language the Court prefaces a long opinion in *Anderson v. Fidelity & Casualty Co.*, N. Y. 127 N. E. 584 (1920). Will some one explain why it required a long opinion to justify a decision that the Yellow Cab service is that of a common carrier of passengers? In these days of mountainous masses of judicial lucubrations, when the courts (in Judge Winslow's neat phrase), are feeding the paper mills, cannot more discrimination be used in the length of language dedicated to the demonstration of the indubitable and the exegesis of the evident?

J. H. W.

AN OYSTERMAN'S DUTY.—James West—

"a strong man, thirty-three years old, at work, the owner of real estate worth \$800, and of a boat which he uses in connection with his business as an oysterman" (we quote the court's opinion) "married Mary Sue West after having been arrested and charged with seducing her under promise of marriage. She was at that time with child, and she alleged that he was its father. He admitted having previous illicit relations with her, and he also knew that she had previously had improper relations with other men. He claimed that until just after the marriage ceremony he had been told that the child would be born in November and that he married her because he thought it probable that the child was his. . . . Immediately after the ceremony, but before the marriage was consummated, however, he was told by his wife that the child would be born in July. He claims that on learning of this fact he concluded that he was not the father of the child": *West v. West*, (1920) 101 S. E. 876 (Va.)

The marriage was consummated the same day, and the next day West abandoned his spouse. The wife accordingly began divorce proceedings and obtained a decree which provided that the husband should be imprisoned unless certain temporary alimony should be paid. The husband appealed.

The court evidently made no allowance for the probable obfuscation of wit of the simple mariner, more at home (and much safer) in communion with the bivalves of Mobjack Bay than in feminine society in Saluda or Gloucester. Nor did the court in its cloistered ease measure the cyclonic surge of events which swept down on an untutored oysterman who knew the perils of the sea but who was unschooled in the dangers of the sirens who ravage the Virginia littoral. Within a period of twenty-four hours he was first thrown into despair (and likewise in jail); then he was elevated to joy in the happy consciousness of parenthood—he above all the others!; then he was shown a way to loosen his chains and to claim his own flesh and blood; and then he was married to the companion of his joys and sorrows. We insist as an observation of human nature, valid at least among landsmen, that any one of these events would suffice even for the longest day in the year under a daylight saving schedule. To combine two of these events within the same six months is a moral abomination; but to unite all three in twenty-four hours, it is fair to say, is to deprive an oysterman of all sense of arithmetic. The difference in causation, in human embryology, between July and November, to a mind benumbed by arrest, jail, parenthood, marriage, and the nuptials, defies calculation. Yet the court, in the midst of its sheepskins and in the lassitude of spirit which comes with a January thaw, saw nothing of this mental perturbation.

The court says:

"Notwithstanding his knowledge, however [we urge that he could not have known anything at the time] of the previous unchaste character of his wife, he apparently condoned all of her previous offenses and cohabited with her on the night of the marriage."

We may here appropriately quote (with a little alteration) the lines from Heywood's Proverbs (Cent. Dict., sub voc. "Oyster"):

"Herewithal his wife to make up his mouth
Not onely her husband's taunting tale avoweth,
But thereto deviseth to cast in his teeth
Checks, alimony, and choking oysters."

The situation reminds us of a proceeding some years ago, before the late Joseph E. Gary, for many years judge of the Superior Court of Cook County, and one of the most interesting personalities of his time in judicial office. A respondent was attempting to show cause why he should not be committed for contempt in failing to pay permanent alimony of seven dollars a week. When the affidavits had been read, Judge Gary pondered the question for a time and then looking at the opposite wall of the courtroom, he slowly spoke, but as if unconscious of his surroundings. Evidently he was still reflecting on the case. He said—

"Seven dollars a week...[pause]...a dollar a day...[pause]... for the rest of his life...[pause]...and not living with her either... [long pause]...I wouldn't pay it! I'd run away first!"

It would be interesting to know as a matter of statistical information how such decrees turn out. Do the respondents in the average case pay, or do they run away. Since, as to this inquiry we have no more information than about anything else in the field of applied law; in other words, since we know nothing of the actual operation in a social way of legal rules, it is idle to speculate. But in a case like the one under discussion, it may not be amiss to suggest that if we are interested in real justice and not merely in the application of the primitive test of liability which made no distinction between intention and accident, the legal operation should have been worked out in a court of admiralty, since it involved a clear situation of 'communio incidens,' where not only James West, but various others, should have shared in a kind of general average. The same result might have obtained on the facts in a kind of 'actio familiæ eriscundæ.' We admit these suggestions are fanciful in that precedent is lacking in the common law, but they are not more whimsical than the language of the court in attempting to find a juristic basis of liability, for the court says:

" . . . a decree for alimony is essentially different from an ordinary debt or judgment for money. It is an allowance in the nature of a partition [as above suggested] of the husband's property [what we suggested was a partition of his liability], of which the wife is entitled to a reasonable share for her maintenance. It is an order compelling a husband to support his wife, and this is a public as well as a marital duty—a moral as well as a legal obligation. [What is the inference about other legal obligations?] *The liability is not based upon a contract to pay money, but upon the refusal to perform a duty.*" [Our italics.]

If philosophy reduces to the categories (Ritchie, "Cogitatio Metaphysica," §§ 2, 14), so also in important measure does the law.

What the court is evidently struggling to express is the category of liability based on personal (non-economic) rights in personam. We do not charge the Virginia court with inventing the potpourri of ideas above quoted, since the words italicized may be found in numerous cases—one of them in Illinois—(*Barclay v. Barclay* (1900), 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351), and another in the Supreme Court of the United States (*Audubon v. Shufeldt* (1901), 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735). Neither do we quarrel with the proposition, if only it had been stated intelligibly that a duty to pay alimony differs from a duty to perform a contract (or the liability to pay damages for breach of a contract) in that the one deals with *proprietary* rights in personam, and the other with *personal* rights in personam, the latter involving the risk of imprisonment, etc., and the disadvantage of non-dischargability in bankruptcy, etc.

The moral of this sad recital is that an oysterman should stick to his oysters, and that a legal appendix may be successfully removed with a juristic lawn-mower, even though an oysterman perish of the success.

A. K.

WHY SHOULD NOT REMEDIES FOR VICTIMS OF DISHONEST BUSINESS SHARPEERS BE ENCOURAGED?—"Resort to this action is *not to be encouraged*," says the U. S. District Court for the Northern District of West Virginia, in *Handel Co. v. Jefferson Glass Co.*, May 1, 1920, 265 Fed. 286, 289.

What action? The action for unfair competition by palming off or passing of goods through imitation of mark, name or style.

"Manufacturers have three distinct methods," says the judge, "under our laws, whereby they may protect their peculiar trade articles from being manufactured and sold by others. First, as to some such articles, by securing a patent; and second, as to others by securing a (registered) trademark monopoly; and third, by resort to equity to secure an injunction against unfair competition." But, he continues—

"Resort to this (last) action is not to be encouraged."

We respectfully deny this.

The third remedy is applicable where the others are not available. And it is precisely at this opening that the unscrupulous rival seeks to make his inroads on a business built up by the honest and skillful toil of years. The business world is full of parasites.

"So, naturalists observe, a flea
Has smaller fleas that on him prey,
And these have smaller still to bite 'em;
And so proceed ad infinitum."

It can be said correctly that no single article, for which a legitimate patronage of substantial value is built up, fails to attract its corresponding parasite, seeking to live off the fruits of others' toil. This is notorious. Read Mr. Edward S. Rogers' masterly little book on "Good Will, Trade-Marks, and Unfair Trade" (reviewed in these pages, vol. IX, p. 366), if you desire to see the facts convincingly set forth.

The common law action for unfair competition is here often the only remedy for the honest man. The federal courts in the last twenty years have increasingly given full recognition to this. The old reluctance to favor it has passed away. We thought that that reluctance had disappeared entirely. But now it crops up again, as a remnant.

We record our regret that any federal judge still entertains such a view. It is an anachronism. If persisted in, it would injure business morale. The honest business man ought to be able to feel confidence that the courts will protect him to the limit of the law. If the courts are not to encourage the honest business man, so much the worse for the court.

J. H. W.

A CONTINENTAL DECISION—INNKEEPER—LIABILITY OF—NEG-
LIGENCE OF GUEST.—[Entscheidungen des Reichsgerichts, Erster
Band: 1880. No. 36.]

Judgment of 14 Nov. 1879.

Argument:

D. 4, 9, 1, 3 pr. (nautae, caupones) is not a special remedy applicable only to shipmasters, but the rule of the edict: quod cujusque saluum fore receperint, nisi restituent, in eos iudicium dabo (D. eod. 1): is a general one which governs both shipmasters and innkeepers.

The relation for which the law provides liability does not necessarily begin with the acceptance of the guest at the inn and the delivery of his luggage, and it may, for example, arise without doubt in a case when a prospective guest has notified the innkeeper of his coming and has requested that a wagon be sent to the railroad station, where the luggage is received by the custodian of the wagon and is misappropriated before the guest or the goods reach the inn.

We agree with the court below in its view of the practice where an innkeeper sends vehicles to meet incoming trains, that this amounts to an invitation to a traveler to enjoy the facilities of the inn and to use the wagons for his person and his luggage. This being so, the persons whom the innkeeper puts in charge of the wagons must be regarded as the innkeeper's agents, and that a liability arises when luggage is so accepted can not, at least, be denied when the traveler puts his luggage in charge of the wagon driver with the observation that he desires to stop at the inn and when the luggage is accepted by the driver without objection. The acceptance of the guest—the defendant argues that the innkeeper may still refuse him admittance—may be assumed. The sending of the wagon is an invitation to become a guest and is not, as the defendant argues, an invitation to the traveler to offer to become a guest. The later refusal of the innkeeper to receive the traveler cannot take away his existing liability, since it amounts to no more than refusal longer to entertain one who already is a guest.

. . . So far as the plaintiff sues for money and valuable papers misappropriated he cannot recover because he was guilty of negligent conduct. The plaintiff was clearly imprudent in allowing a hand satchel to be placed in the bus without telling the driver that it contained a large sum of money (987 M.) when he knew that the vehicle would not return at once, and that there was no one but the driver to look after the luggage.

[An analogy for the conclusion arrived at is found in H. G. H., Art. 395.]

MODERN SANITATION AND THE COURTS.—No sour critic of our profession can maintain that our courts are not awake to the doctrines and demands of modern sanitary science. The Supreme Judicial Court of Maine has decided (*Williams v. Sweet*, Me., 110 Atl. 316), that a guest who has contracted for board at a summer resort is entitled to leave without completing the contract upon finding that swarms of flies settle upon tables and the food, and make his further sojourn unsanitary and repulsive. To the various eulogies in judicial annals upon the cherished canine and the excellent equine may now be added an anathema upon the immundious muck-raking *Musca Domestica*, alias the Filthy Family Fly:

"It is a matter of common knowledge that the common house fly has come to be regarded by the enlightened understanding, not only as one of the most annoying and repulsive of insects, but one of the most dangerous in its capacity to gather, carry, and disseminate the germs of disease. He is the meanest of all scavengers. He delights in reveling in all kinds of filth; the greater the putrescence the more to his taste. Of every vermin, he above all others is least able to prove an alibi when charged with having been in touch with every kind of corruption, and with having become contaminated with the germs thereof. After free indulgence in the cesspools of disease and filth, he then possesses the further obnoxious attribute of being most agile and persistent in ability to distribute the germs of almost every deadly form of contagion."

And the scientific hospitality of the judicial mind is farther demonstrated by the following list of articles which are found decorating the legalistic annals of jurisprudence:

"Ainsworth, R. B. (1919), The House Fly as a Disease Carrier, *Journal Royal Medical Corps*; Cobb, J. O. (1905), Is the Common House Fly a Factor in the Spread of Tuberculosis? *American Medicine*, IX; Dutton, W. F. (1909), Insect Carrier of Typhoid Fever, *American Med. Assoc.* LIII; Felt, E. P. (1910), The Typhoid House Fly and Disease 24th Rept. State Entomologist of N. Y.; Fraggatt (1910), The House Fly and the Disease It Spreads, *Agric. Gazette*, New South Wales; Ficker, M. (1903), Typhus Fliegen, *Arch. f. Hyg.* XLVI; The Fly as a Carrier of Tuberculosis, Haywood, E. H. (1904), *N. Y. Medical Journal*, LXX; Jackson, D. D. (1907), Report Committee on Pollution."

Of recent date also is a ruling that a medical man, who has discovered that a patient is suffering (apparently) from a loathsome and contagious disease, is privileged to notify the patient's boarding-house keeper, and is not liable for the patient's conse-

quent dismissal from the boarding-house (*Simonsen v. Swenson*, Nebr., 177 N. W. 831, 1920.)

And now comes a Chicago case in which the city seeks to enjoin a boarding-house keeper, who is a "typhoid carrier," from continuing the business of taking boarders. This, indeed, if the city's claim is recognized, will be a triumph for modern sanitation. Doubtless, at last, somebody will cite the ancient writ, five centuries old, "*De Leproso Amovendo*," which the learned Fitzherbert gives, for enjoining a "leper or lazar" to keep himself at home and not thrust his company upon his neighbors at church or elsewhere. We have been waiting for a long time to see that precedent invoked. It restores our faith in the capacity of the common law to supply analogies for every new situation developed by modern knowledge and invention.

J. H. W.

AN UNINTERESTED DEFENDANT.—A lawyer who was once state's attorney for an Illinois county containing more than one million inhabitants, and who later occasionally defended persons charged with criminal offenses, tells of an experience in the court room to illustrate the fact that lawyers and judges unaccustomed to criminal trials sometimes find their training and their intuition insufficient. The narrator had defended an accused person and secured a verdict of acquittal. Thereupon the recently appointed assistant state's attorney made a motion for a new trial. The judge, recently assigned from a civil calendar, listened to the prosecutor, and then turned to the defending attorney to hear his argument. The latter said that he did not feel concerned as to the outcome of the motion as his client had informed him that he did not intend to be present at the new trial anyway. The judge was so impressed by this mere suggestion that he overruled the motion.

H. H.

CONTRIBUTORS.—C. VAN Vollenhoven is professor of Colonial Law at the University of Leyden. Professor van Vollenhoven's paper was read recently before the Amsterdam Academy of Sciences. WILLIAM V. ROWE is a member of the New York bar and is in practice at New York City. URBAN A. LAVERY is chief draftsman of the Committee on Phraseology and Style of the present Illinois Constitutional Convention. Mr. Lavery's paper was read before the Legal Club of Chicago on November 1, 1920. WILLARD L. KING is drafting clerk for the Committee on Phraseology and Style of the present Illinois Constitutional Convention.

BOOKS AND PERIODICALS

EQUITY. Illinois Edition. An Analysis and Discussion of Modern Equity Problems, with Notes on Illinois Cases. By George L. Clark, S. J. D., Professor of Law, University of Missouri. Columbia, Missouri: E. W. Stephens Publishing Co., and Chicago, Illinois: Burdette J. Smith & Co., 1920. Pp. lii + 761.

The main body of this work has already been reviewed (*ILL. L. REV.*, XV, 132-34). The primary purpose of the book, in the author's own words, was "to present, analyze and discuss various equity problems"; and of its great merits of accomplishment within the limits of the purpose thus indicated, the reviewer is glad again to make acknowledgment. In agreement with Professor Clark, he believes that a book opening up analytically the pitfalls and complexities of equity problems was far more needed than an informational text-book of the ordinary type; and continued use of the work has given confirmation to this opinion.

When the original work was reviewed, it was not known that various state editions were to be published. Some five of these have already appeared or are ready for publication, and the preparation of half a dozen others is in progress. The author's general policy in emphasizing principles, without accumulating citations of cases, seemed sound, but it now appears that thousands of citations were reserved for inclusion in special state editions, in the form of appendixes to the original work. In so far as such editions may be published, they will most certainly be of great usefulness; but in so far as reliance must be placed, by readers in other and less fortunate states, upon the main work, it remains questionable (it is necessarily a matter of individual opinion) whether the range of citation therein was not unduly narrow.

The edition for Illinois contains an appendix of 121 pages. Of these, 96 are occupied by lists of Illinois cases, often with brief analyses or critical comments, and still oftener with a mere indication of their subject matter or of their holdings, classified under the sections of the main work whose principles they illustrate. The remaining 25 pages give an alphabetical table of cases, with indication of the section numbers where references to them are made, and a similar list of citations of the *ILLINOIS LAW REVIEW*.

Any practitioner will benefit by Mr. Clark's discussion of the principles which these cases either apply or violate, and to candidates for admission to the bar the book is a veritable godsend.

F. S. P.

A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS. By Ralph E. Clark, of the Cincinnati Bar. Cincinnati: The W. H. Anderson Company, 1918. Vol. I, 981 + lxxxv; II, 983-2176.

The importance of the subject of Receivers warrants a somewhat more extended treatment by the text writer than that which has before been awarded to it and such a book Mr. Clark has offered to the profession. The work is in two volumes and though somewhat bulky in form and in appearance and capable no doubt of some condensation will be welcomed by the bar as a useful addition to legal literature. It is a quite successful attempt "to make an analysis of the usages and rules of equity underlying the law and practice of receivers as to present to the readers the discussions and legislative enactments applicable to the various phases" of the subject.

In addition to the leading American cases upon the subject, it cites and discusses many English decisions, both old and recent, and this for the adequate reason that though the American courts have been inclined to merely lay down the rule and to cite the precedents, the English have been more inclined to give the reason for their rulings, and thus to furnish a basis for a science of the law. The author also has gone to some pains to point out the difference between the law and practice of the two countries, so that the English cases, which we have in the past only too blindly cited, may be better analyzed and their real application, or failure of application, to our law and to our statutes, be better appreciated and understood. Volume I is largely concerned with the judge-made law upon the subject; Volume II deals with bankruptcy statutes of both England and America in so far as they relate to the subject under consideration. It also contains about 200 adjudicated forms, as well as a timely chapter on "Custodian of Alien Enemy Property."

Like so many books of recent years which have attempted in any way to be comprehensive in their nature, the work is neither original nor constructive nor, in the strict sense of the term, scholarly. It hardly has the finish of some of its predecessors, nor does it disclose the philosophic mind. It, however, contains a clear statement of the law as the author sees it, and as it no doubt exists, and as far as we have been able to see, its authorities and cited cases are in point and have been well selected. It is not in any sense original except in the conciseness of its statements and in its wide and comprehensive treatment and inclusion of the many intricate questions which are involved in the important subject under consideration. It contains a fund of information and suggestion and almost every phase of the subject seems to have been within its contemplation.

It is a summary rather than treatise. It is, however, up-to-date and will tend to clarify much which was obscure. It will be especially valuable to the practicing lawyer, whose aim is to know what the decided law is, and to win cases, rather than to develop theories

or to add to the growth of the law, or even to correct the abuses therein. It will be of less value to the scholar whose desire is to know the reason and to build for the future. Yet, in order to build for the future and to know the reason, we must know what the courts have decided and what the legislatures have formulated.

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ANDREW A. BRUCE.

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THE FEDERAL TRADE COMMISSION AND THE PACKERS

BY HENRY VEEDER

Each succeeding volume of charges periodically issued by the Federal Trade Commission, and the promptly following denials and counter charges of the packing companies, have been considered good copy by the newspapers, and have been given wide circulation. The charges of a department of the government that the packing companies had acquired a monopolistic control, not only over the meat industry, but also over almost everything else on the dining table, and that they are extending their tentacles over the dining tables of practically the entire world, were at least interesting news, and, as phrased by the expert publicity agents of the Commission in its advance releases to the press, were truly sensational.

The Federal Trade Commission, in July, 1918, after an investigation, lasting a year or more, of all the books and papers of the packing companies, which were freely opened to them, and after ex parte hearings conducted by Mr. Heney, lasting three months, published a summary of their investigation, and, at psychological intervals, issued six reports of several hundred pages each, and there is a seventh report yet to come. In these reports they charge that the five larger packers "not only have a monopolistic control over the American meat industry, but that they have secured control, similar in purpose, if not yet in extent, over eggs, cheese, and vegetable oil products, and are rapidly extending their power to cover fish and nearly every other foodstuff." The Commission further alleges that the combination among these five packers "is not a casual agreement brought about by indirect and obscure methods, but a definite and positive conspiracy for the purpose

of regulating purchases of live stock and of controlling the price of meat," and they assert that the terms of the conspiracy are contained in documents which the Commission claimed to have in its possession.

The Commission recommended "that the government acquire through the Railroad Administration all rolling stock used for the transportation of meat animals" and "all privately owned refrigerator cars," and "that such ownership be declared a government monopoly"; that "the government acquire through the Railroad Administration the principal and necessary stockyards of the country to be treated as freight depots"; that "the government acquire such of the branch houses, cold storage plants, and warehouses as are necessary to provide facilities for the competitive marketing and storage of food products in the principal centers of distribution and consumption, the same to be operated by the government as public markets and storage places."

It is difficult to see how more serious charges could be brought against an industry or what more drastic remedies could be proposed, especially when it is remembered that these charges were made by an important department of the federal government.

It is no wonder that many people believed the charges and that following the publication of these reports there have been six congressional investigations of the packers, lasting for months and costing thousands of dollars. It is no wonder that the prosecution and conviction of the packers has been demanded and that legislation has been proposed which, if enacted, would so regulate, supervise, and disintegrate their business as to seriously cripple if not destroy it. It is rather a surprise that the business is still in existence and still being efficiently conducted under private ownership by its regularly elected officers. If these packers were guilty of what the Federal Trade Commission charged, or a small part of what they charged, they should have been penalized to the limit and there were then and are now sufficient laws upon the statute books to reach every wrongful act with which they were charged.

I

The Federal Trade Commission came into existence in the Fall of 1914. It was created by Congress because of the uncertainties growing out of the limitations upon business co-operation under the anti-trust laws and the difficulty of determining just

where those laws drew the line between legal and illegal co-operation. This was the central idea in President Wilson's mind when he proposed to Congress the creation of the commission. He said:

"The business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission. The opinion of the country would instantly approve of such a commission."

The discussions in Congress which followed clearly indicate that the reason for creating this Commission which existed in the President's mind likewise was the motive which caused the Congress to enact the Federal Trade Commission law. Following the creation of the Commission, the papers and periodicals of the country commended the action of the Congress in creating the Commission and justified its creation upon the same grounds.

In order to insure continuity in the activities of the Commission and the establishment of permanent methods, the term of the commissioners was fixed at seven years. When first created the Commission proceeded along the lines suggested by the President. It encouraged co-operation among manufacturers, especially in reference to the figuring of their costs, and the then chairman of the Commission published a book on this subject. Within three years, however, not one of the original commissioners remained in office.

Naturally, with the changed personnel, the purposes and practices of the Commission changed. The practice of giving wide publicity to charges made by it against business men was adopted. In many cases, at the hearings which followed, these charges were shown to be unfounded. This practice, of course, worked a great injustice to defendants, and compelled them to resort to the newspapers in self-defense, so that the public press has been filled from time to time with the controversies between the Federal Trade Commission and business men.

II

In February, 1917, the President directed the Commission—

"to investigate and report the facts relating to the production, ownership, manufacture, storage, and distribution of foodstuffs, . . . to ascertain the facts bearing upon alleged violation of the anti-trust acts and particularly upon the question whether there are monopolies, controls,

trusts, combinations, conspiracies or restraints of trade out of harmony with the law or the public interest."

This letter does not specifically refer to the five packers, but it was the outgrowth of an agitation on the part of a small but active group of live stock producers, which had lasted for at least two years. These men assumed that the packers arbitrarily, by agreement or otherwise, regardless of the law of supply and demand, fixed the price which they paid for live stock and the price which they charged for meat. They claimed that the fluctuations in the market price for live stock were due to the selfish motives of the packers.

They first attempted to secure congressional direction for an investigation of the packers. Several resolutions were introduced in Congress, most of them by Congressman Borland, of Kansas. These resolutions directed the Federal Trade Commission to investigate and report to the House of Representatives the facts relating to any or all violations of the anti-trust laws by the five packers, naming them in the resolutions. At the hearings on these resolutions the packers protested vehemently against being charged with violation of law before investigation, but stated that they were willing that there be an investigation by the Federal Trade Commission, or any other proper body, of the entire industry, as it was picturesquely expressed, "from the calf to the beefsteak," provided there was no condemnation of them, or any one else, prior to the investigation.

Following this agitation, the President wrote the letter of February, 1917, and it has been publicly claimed by members of this group of producers that they were instrumental in persuading the President to write the letter. At any rate, the Federal Trade Commission promptly proceeded to investigate the five packers.

While the Borland resolutions were pending in Congress, and before the President wrote his letter directing the Federal Trade Commission to investigate, in order that there might be no misunderstanding of the attitude of Swift and Company toward the Federal Trade Commission, the president of Swift and Company wrote the following letter to the Commission:

"The present Congress has been urged to authorize and direct the Federal Trade Commission to make an investigation of trade conditions surrounding the production, transportation and marketing of livestock, the packing and marketing of the produce thereof, and a like investigation of allied industries.

"For the purpose of avoiding any misunderstanding of the attitude of Swift and Company toward such an investigation, I have the honor

to inform the Federal Trade Commission that, if in its judgment such an investigation is advisable, whether under direction of a resolution of Congress or upon its own initiative, the books and records of this company will be freely open to the commission and to its representatives and the officers and employees of the company will, upon its request, be pleased to furnish the commission with any and all information in its possession in reference to that part of the business under investigation with which the company has to do."

Again when the President's letter was announced in the newspapers, Swift and Company wired the Commission that its books would be freely open to the Commission and its representatives and that the company would be pleased to furnish the Commission with information in its possession. In this telegram the company made the suggestion that in order to be fair, the investigation should cover the entire industry "from the calf to the table." I understand the other packers likewise offered to submit their books and papers for the inspection of the Commission.

III

The investigation by the Commission opened with a conference between a member of the Commission and the packers in Chicago in July, 1917. At this conference the packers were asked four questions in regard to the meat business, but no charges or intimations that the packers were violating any law were made either at the conference or in the questions propounded. Following this conference the Federal Trade Commission made a thorough examination of the books, papers, and documents of the packing companies, which were freely opened to its examiners.

In September, 1917, the newspapers quoted the Commission as declaring that it had learned that the packers had entered into an agreement by which none of the big firms was to compete with the others, and that in this way prices of meats were to be kept up through lack of competition, and further, that the retailer was wholly at the mercy of the "trust." This was prior to any hearing and was the beginning of the Commission's publicity, charging the packers with wrong doing, which, together with the publication from time to time of the Commission's *ex parte* reports, compelled the packers, in self-defense and in the absence of any other forum, themselves to seek publicity in the newspapers. When this news item quoting the Federal Trade Commission was called to my attention, I wrote to Commissioner Davies that we thought it hardly fair these unproved accusations should be spread broadcast

in the public press. I reminded him that in a conversation with him, before the President had written his letter of instructions, I had requested that Swift and Company be given an opportunity to be heard before it be publicly charged with violations of the anti-trust law, and I renewed my request that the company be given the opportunity to be heard before it be condemned.

In December, 1917, the so-called Heney hearings began, the first one at Washington.

At the hearing which followed in Boston on December 28, 1917, where Commissioner Murdock presided, Mr. Heney announced:

"I think it might be well for me to state, for the benefit of the members of the press, that this investigation is not a trial in which any parties are defendants and thereby entitled to appear by attorney. It is an investigation into the economic conditions as well as practices that may be prevailing and it is *ex parte*, and while the commission will be glad to hear any witness that presents himself here, no one comes here with the right to be represented by attorney, with the right to put on witnesses, because there is no investigation of that sort being conducted."

The Federal Trade Commission Act contains no authority for *ex parte* hearings. The act provides for only one kind of hearing, and the respondent is given the right to appear and defend. No complaint or notice, as required by the Federal Trade Commission Act, was ever served upon the packers, and at the hearings held in Chicago, a stenographer sent by the attorneys for one of the packers to take notes of the hearing was not permitted by Mr. Heney to remain in the room. Chairman Colver, in his statement before the House Committee on Interstate and Foreign Commerce, in the hearings on the Sims Bill in December, 1918, admitted that these five packers did not have the opportunity to call witnesses on their behalf or to cross-examine the witnesses that Mr. Heney called.

The Heney hearings, which lasted some three months, and which were held at the various cities in the United States, were presided over by one of the examiners of the Commission, who was under the direction of Mr. Heney, to whom the Commission had turned over the entire investigation.

At these hearings, Mr. Heney examined the witnesses he had called, and introduced in evidence letters which he had selected from among those copied by the Federal Trade Commission's examiners from the files of the packers, including their most confidential files. These letters, together with Mr. Heney's comments and con-

clusions in reference to them, were often turned over to the representatives of the newspapers before they were given to the official stenographer to be inserted in the record, and were thus given the promptest and widest publicity.

The Federal Trade Commission Act expressly prohibits any officer or employe of the Commission from making public any information obtained by the Commission without its authority, unless directed by a court.

Obviously the packers' letters were read into the public hearings for the purpose of securing the desired publicity, without violating this provision of the statute; certainly they were not thus introduced for the purpose of informing the Federal Trade Commission of their contents, as they had had them in their files for some time.

At the time of the hearing in Chicago, an arbitration proceeding was pending before Judge Alschuler, relative to the wages of the employees of the packers. That hearing took place in a room in the Federal Building near the one in which the *ex parte* hearing was being conducted. At this particular hearing, Mr. Heney read into the record documents copied from Swift and Company's files, which he then handed to the attorney for the labor unions, who introduced them in evidence before Judge Alschuler. In his testimony at the hearings before the Committee on Agriculture of the United States Senate, in February, 1919, Mr. Heney frankly admitted that he produced the letters on his own initiative, so that the attorney for the labor unions could have the benefit of them in the arbitration proceedings; and he sought to justify his use of the Federal Trade Commission's records to further private litigation on the ground that he thought it was in the public interest and in the interest of the employees.

Swift and Company, and I believe the other packers, promptly protested to the Commission against the methods employed in these proceedings, and upon being informed by the Commission that the investigation was entirely under the direction of Mr. Heney, Swift and Company protested to the President. To these protests the secretary to the President replied that the President had made careful inquiry of the Federal Trade Commission as to just what the character and process of the present investigation were; that this inquiry had convinced the President that there was no warrant for his interfering with the judgment and action of the Commission; and that it was probable that the significance of many of the matters apparently irrelevant, which the Commission had drawn out in evi-

dence would, it was hoped, clearly appear in the final report of the Commission.

Swift and Company later renewed its protests to the President, but without avail, and the Heney hearings continued their way with a trail of newspaper controversy.

After publication of the Commission's summary on the meat packing industry, Swift and Company telegraphed to Chairman Colver that the summary contained many very serious charges against the company which were not based on a correct interpretation of the evidence collected; that it believed it should have been given an opportunity to discuss and explain the evidence and data collected and that such explanation would have saved the Commission from doing the packing industry a serious injustice. Swift and Company requested, before the full report was published, that it be permitted to go over the evidence with the examiners of the Commission in order to submit its explanation and interpretation of the evidence and data collected. The company offered to accommodate itself to any reasonable requirements that the Commission might deem necessary and proper, and in every way possible to facilitate the examination and consideration of the evidence. To this letter the chairman telegraphed: "If your attendance is found advisable, you will be advised." Swift and Company was never advised that its attendance was advisable.

IV

It was during these hearings that Mr. Heney made the raid upon my vault, which got into the courts. In January of 1918, one of the examiners of the Commission appeared at my office and made known the desire of the Commission to inspect, examine and copy certain books and documents in my custody belonging to Swift and Company. Permission was readily granted; but within two or three days it developed that the examiners desired to search every file in my office—personal, private, confidential, or privileged. Many of them related in no way to the legitimate inquiry of the Commission. I notified the chief examiner that while he was at liberty to examine any of the corporate papers of Swift and Company in my possession, I could not permit him to make an indiscriminate search of all the papers in my office, on the pretext that he was looking for papers, which, under the Trade Commission Act, he was entitled to examine. In order to satisfy him that I was not concealing papers that did properly relate to

the investigation, I informed him I would let the examiners see any papers they called for, but that I would refuse to let them copy papers that did not relate to the investigation. After working a day or two under this arrangement, the examiner became dissatisfied and announced that he would make no further investigation until he received instructions from Mr. Heney, who, at the time, was conducting one of his *ex parte* hearings before the Commission.

The next day the Chicago newspapers carried dispatches from Washington which stated that:

"Reading of letters and documents from the confidential files from the Chicago packers into the record of the Federal Trade Commission's meat-packing hearing came to a sudden halt late today to permit Francis J. Heney, special counsel, to return to Chicago to direct the search for further material.

"Henry Veeder's vault, containing the correspondence of the lawyer—who was characterized by Mr. Heney as the 'clearing house for the joint operations of the packers'—has been sealed by Hugh McIsaac, the commission's examiner, who obtained most of the documentary evidence already introduced. Unless Veeder reconsiders his refusal to permit the examination of his papers to continue, court action will be taken by the commission."

Mr. Heney was quoted as saying:

"Before I left Chicago I left Hugh McIsaac in charge of our investigators there, and I directed them to examine the correspondence files of Henry Veeder, who is shown to be the clearing house of the packers of the expenses which they incurred jointly and which they divided in the purchase of cattle, sheep, hogs, and calves throughout the country. I have written evidence on that, Mr. Commissioners, which is already partly in, but we have a little more yet.

"Mr. McIsaac wired me last night that after he had gone part of the way with the examination of the records there, which are in a vault in Mr. Veeder's office, Mr. Veeder changed his mind on the matter. I do not know whether that was due to the character of what was being found or not, but I apprehend it was from my knowledge of some of the things found.

"I have concluded, in view of what I know to be the importance of the correspondence there, that I will temporarily postpone any further hearings here, provided the commission is satisfied that I should, to leave for Chicago to take charge of this matter."

I will state here that none of my files at that or any other time contained any documents which would even tend to support Mr. Heney's charges.

Mr. Heney came to Chicago and had an interview with me. I renewed my offer to permit him and his examiners to see all my papers, but to copy only those which in my judgment they

had the right to copy, leaving it for the court to determine their rights, in case of dispute. The next morning my office was invaded, without notice, by deputy marshals, federal trade examiners and attorneys, including Mr. Heney, who proceeded to search the files in my vault under a search warrant issued by the federal court pursuant to the Espionage Act, which authorized a search for property which had been used as a means of committing a felony. In support of the warrant, Examiner McIsaac made an affidavit which the Circuit Court of Appeals characterized as follows:

"Not a single statement of fact is verified by his oath. All he swears to is that 'he has good reason to believe and does verily believe' so and so. He does not swear that so and so are true. He does not say why he believes. He gives no facts or circumstances to which the judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts. And under our system of government the accuser is not permitted to be also the judge."

Upon application to the federal court, the search of my office under this warrant was stayed, and in March, the Circuit Court of Appeals ordered the search warrant quashed.¹ The Supreme Court afterwards denied a petition for certiorari.

I might say that under this void warrant my office, for more than twelve weeks, was policed night and day by three shifts, each of two men—one a federal trade examiner, the other a deputy United States marshal, and by a third shift of men, my own watchmen to watch the federal trade watchers. These men sat before the open door of my vault, which the government representatives refused to allow to be closed, although I offered the United States attorney the privilege of putting his own combination upon the door.

After the United States Supreme Court refused to review the decision of the Circuit Court of Appeals, the Federal Trade Commission renewed its original request for examination of the papers and documents in my files to which the Commission might be entitled. I thereupon gave the Commission full access to my files with the understanding that if there was any dispute as to the propriety of the examiner inspecting and copying any particular paper or document, the dispute should be referred in an orderly manner to the proper court for decision. In this examination, which lasted six days, the five or six examiners saw every document

1. 252 Fed. Rep. 414.

in my office which they asked to see. Twelve days later the Commission sent another set of examiners who spent eight days in my office, largely checking the work of the previous examiners.

VI

Before taking up the legislative situation growing out of the Federal Trade Commission's report, I wish to call attention to the effect of the report in foreign countries. To make sure that this report should reach foreign governments, the Commission not only sent copies of their report to the representatives of the foreign countries in Washington, but addressed a letter to the chief of the diplomatic bureau of the State Department, asking him to send copies of the summary of their report to the heads of those countries. With this letter they enclosed a form letter to be used by the Diplomatic Bureau in which they said:

"There is enclosed herewith a copy of the summary of the report of the Federal Trade Commission on the meat industry, which was recently released for publication by President Wilson, and which may be of interest to your government."

The logical inference to be drawn from this letter is that the summary of the Federal Trade Commission's report, with its charge that the Chicago packers are in a conspiracy to monopolize the world's meat business, was transmitted to the heads of foreign governments at the suggestion and under the direction of the President of the United States.

The London papers promptly took up the report, both in their news columns and editorially, and quoted from it at length, with the comment that now the charges against the trust had the seal of the United States government. They expressed the hope that "the Commission's report will mark the growth of a great international movement to stamp out the trust career of the Big Six as a thing more harmful in the world than Prussian militarism." This was promptly followed by government action in the form of an investigation of the activities of the packers by a committee representing the British Board of Trade and Food and Agricultural Ministries, which reported that—

"The Federal Trade Commission on the meat packing industry (1918) has denounced them (the five packers) as a combination working through a livestock pool and has accused them of sundry malpractices, resulting in their domination and control over most of the important points in the United States. The meat companies, on the

other hand, assert that they abandoned all pools and combinations a long time ago."

They added that—

"It has been proposed to us that legislation should be passed, cancelling existing contracts between the meat and shipping companies and that the shipping companies should then be directed to let to purely British meat companies a definite proportion of the insulated space."

In reference to New Zealand, they said:

"A provision for licensing is to be found in a recent act of the New Zealand legislature, requiring all meat exporters to be licensed and empowering the government to refuse a license on the ground of public policy, and we are informed that under that act an export license has been refused to Armour and Company."

The report further recommended that—

"Government contracts for meat should be confined to British producers in the United Kingdom and in the Dominions."

One can imagine the effect upon the production of live stock and the prices for live stock in this country if the recommendations of the British Board of Trade Committee be carried out and the importation of American meat and live stock into England and her colonies be virtually prohibited. If such action is taken, it can be directly charged to the Federal Trade Commission's report.

The cancellation of the Armour license in New Zealand, which is above referred to, was likewise based upon the Federal Trade Commission's report. The facts are that a New Zealand statute provides that it shall not be legal for any person, firm, or company to carry on the business of a meat exporter unless authorized to do so by a meat export license issued by the Minister of Agriculture, who is given absolute discretion to grant or refuse the license as he thinks fit. Armour and Company of Australasia, Ltd., organized under the laws of New Zealand, had been transacting business there for several years past. On December 19, 1918, having complied with all conditions, the Secretary of Armour and Company made application to the Minister of Agriculture for the license as required under the terms of the Act above mentioned. In reply, the Minister of Agriculture wrote Armour and Company as follows:

"The Director General of the Department has submitted to me your letter of the 17th, in which you formally apply for the issue for you of a meat export license under the Slaughtering and Inspection Amendment Act of 1918. I regret to inform you that I cannot grant this license. This decision has been arrived at after the perusal of the

official summary of the report of the Federal Trade Commission on the meat packing industry, appointed by the United States government."

You will notice that the license was withheld not because of any act of omission or commission by the company, but solely because the official charged with the duty of granting such license had perused the summary of the report of the Federal Trade Commission. Armour and Company is still without its license. This arbitrary act of the Minister of Agriculture in New Zealand, in refusing to license an established plant to continue business, because another country had made an adverse report on the business of that company in the other country, is a very fair commentary upon what it means to have government by men instead of government by law.

VII

As a result of the Federal Trade Commission's report, numerous bills were introduced in the Congress to carry out the recommendations of the Commission. The first of these bills to be introduced was the Sims Bill,² which embodied the recommendations of the Trade Commission and, in addition, provided for the regulation, through a license, of any business of the licensee other than that for which the license was issued.

Senator Kenyon introduced a duplicate of the Sims Bill in the Senate. Other bills were introduced by Senators Kenyon and Kendrick in the Senate, and Mr. Anderson in the House. Senator Kenyon stated at the hearings on his bill that the justification for any such measures as the Kendrick and Kenyon Bills (which he himself characterized as radical bills) is in the reports of the Federal Trade Commission. Hearings were had in both the House and the Senate on these various bills.

Chairman Colver and Mr. Heney were the principal witnesses in support of the bills. Mr. Heney, after testifying before the Senate Committee on Agriculture, appeared as counsel for a private farm organization, and cross-examined witnesses, including the presidents of the large packing companies, who presented themselves to testify against the correctness of the Commission's findings of fact and against its conclusions. The hearing on the Sims Bill began in December, 1918, and the last hearing, the one on the Anderson Bill, closed on April 12, 1920. These hearings occupied in all almost six months of actual time, and their record required

2. H. R. 13324.

over nine thousand printed pages. At these hearings a large number of small packers appeared, who testified that their business did not exist by sufferance of the large packers, as charged by the Federal Trade Commission; that they were in direct competition with the large packers, and found them to be fair in their practices and that they had no complaint to make; that they were all of them growing; and that there was open and free competition at the various stockyards markets. Nearly two hundred live stock producers testified that free and open competition existed in the purchase of live stock at the various stock yards.

The net result was the abandonment of the proposals of the Federal Trade Commission as embodied in the Sims Bill, namely, that the President, through such agency as he might nominate, should take over, on behalf of the United States, the ownership and operation of refrigerator and stock cars, the ownership and operation of stock yards and the adjuncts thereof, and the ownership and operation of branch houses and cold storage warehouses.

The Senate Committee on Agriculture ultimately reported to the Senate the Gronna Bill,³ which proposes to require packers and dealers at stock yards to comply with the rules, regulations, and orders to be prescribed from time to time by a commission; gives the commission the power to declare what businesses the packers may engage in other than the business which the commission may determine to be a strictly packing business, and permits the voluntary registration of packers with certain advantages afforded to the registrants. The House Committee on Agriculture now has on its calendar for consideration [in December, 1920] a new Anderson Bill, which, if it is adopted by the committee at the next session of Congress, will be reported to the House. This bill prohibits certain acts which, without further legislation, are covered by the anti-trust laws. Both the Gronna and Anderson bills confer upon a commission the power to try alleged violators of their provisions, thus making the commission, investigator, prosecutor, and judge. An appeal may be taken to the Circuit Court of Appeals, but it is provided that the evidence taken before the commission shall be considered by the court as the evidence in the case and that the order of the commission shall be conclusive if supported "by evidence." In other words, the Gronna and Anderson Bills do not provide for *trial* by a court, but for a *review* by a court to determine whether there was evidence (not a preponderance of the evidence) in support of the order of the commission and, fur-

3. S. 3944.

thermore, the court has power only to set aside the order of the commission if not supported by evidence, but not to determine the reasonableness of the original rule or regulation of the commission. The decision of the Court of Appeals is made final and becomes effective at once, regardless of any application to the Supreme Court for a writ of certiorari.

VIII

There are two ideas running through all the proposed legislation. One idea is that a commission, through its rules and regulations having the effect of law, aimed at tying the packing industry hand and foot to the dictation of political appointees, can stabilize the price of live stock and of meat. The other idea is that a commission, with power to investigate, prosecute, and judge, untrammelled by the legal rules of evidence, may accomplish justice more expeditiously and more accurately than the courts of law now do. The first idea ignores the law of supply and demand, and is based upon the theory that the packers have the power to fix the prices for live stock or for meats at will. The second idea, if carried to its logical conclusion, would eliminate courts of justice and substitute government by men for government by law.

I have just stated that the first idea is based upon the theory that the packers have the power to fix prices of live stock and meat. If any one is interested in the question as to the economic functions performed by the packers in the meat industry, he can find the subject elaborated in the hearings before the committees I have just referred to. The testimony taken at those hearings is published and can be secured from the public printer.

Fresh meat is a highly perishable product. It must be sold by the packer before it loses its freshness, after which the price he can secure for it diminishes rapidly from day to day. The demand for meat varies at the different markets from day to day, dependent upon the supply of fish, poultry and other foods, and particularly upon the weather. When he ships his meat to market, the packer does not know what price he will receive for it later. The meat must be sold within a few days after reaching the market without regard to its cost. It is impossible to fix a price for meat, for the simple reason that the meat cannot be held for the price so fixed. Furthermore, the large packer is absolutely limited in the price he can ask for meat by the price at which the local butcher can sell meat from live stock which the local butcher

has bought and slaughtered. Whenever it is more profitable for the local butcher to buy and slaughter his own animals, he will cease to be a customer of the large packers and will go into the slaughtering business for himself. It is curious how persistent has been the idea that the packer can fix the price of meat and that he sells it the same as a dealer sells non-perishable products, such as dry goods or hardware. Every prosecution that has been brought against the packers has been based upon this erroneous theory and has failed when the proof of the facts is made in court.

Neither can the packer fix the price which he pays for live stock. There are many competing buyers at the different stock yards. The five large packers compete with each other. Small packers from all over the country buy in the markets in the West and ship to their plants in the East. Speculators buy when they think the price offered for live stock is lower than the live stock will bring later. Feeders buy for the purpose of taking the live stock to the farm for fattening.

IX

The charge of the Federal Trade Commission that the packers were a trust, which was rapidly extending its dominion and control over the whole food supply of the nation, and that its development would mean the elimination of the wholesale grocers as distributors, led to a persistent demand by their trade associations for legislation to prohibit the packers from handling foods generally dealt in by the wholesale grocers. This demand by the wholesale grocers, together with continued agitation by the group of live stock producers I have referred to, for the divestment by the packers of their ownership in stockyards, caused the Department of Justice to demand that the five larger packers consent to a decree requiring them to dispose of their interests in stockyards and in the so-called 'unrelated lines.'

The data collected by the Federal Trade Commission in its investigations as well as other information in the possession of the Department of Justice had been submitted by Attorney General Gregory to "two eminent lawyers, possessed of large experience in such matters," who had reported that the evidence would not justify court proceedings against the packers.

After conferences lasting for some time, the attorneys for the five packers entered into a stipulation with the Attorney General and his associates for a decree. Later a petition for injunction

and the answers of the defendants were filed in the Supreme Court of the District of Columbia, and the decree was entered upon the consent of the parties.

It must not be understood, however, that in consenting to this decree the packers in any way admitted that they were guilty of conspiring or combining in violation of the Sherman Act. The decree contains this express language, and would not otherwise have been consented to:

"while the defendants, and each of them, maintain the truth of their answers and assert their innocence of any violation of law in fact or intent, they nevertheless, desiring to avoid every appearance of placing themselves in a position of antagonism to the government, have consented, and do consent, to the making and entry of the decree now about to be entered without any findings of fact, upon condition that their consents to the entry of said decree shall not constitute, or be considered an admission, and the rendition or entry of said decree, or the decree itself, shall not constitute or be considered an adjudication that the defendants or any of them have in fact violated any law of the United States."

The decree first enjoins the defendants, in general terms, from entering into any contract, combination or conspiracy in restraint of trade or commerce among the several states or from monopolizing or attempting to monopolize such commerce; then enjoins them from owning any interest in stock yards or stock yard terminal railroads, and requires them to file a plan with the court for the disposition of their interests in stock yards. It further enjoins them from manufacturing, selling or distributing certain commodities named in the decree, which are subdivided under certain general heads, as fish, vegetables, fruits, confectionery and soda fountain supplies; jams and jellies; spices and condiments; coffee, tea, chocolate and cocoa; nuts, flour, sugar and rice; bread; and the corporation defendants are enjoined from manufacturing, dealing in or distributing, in addition to the articles named, cereals, grain, grape juice, and a group of miscellaneous articles, including cigars, fence posts, bar iron, brass castings, brick, cement, structural steel, etc.

The packers have all filed plans for disposing of their stock yard interests, and two of them, Armour and Swift, have supplemented their plans by filing contracts, into which they have entered. The packers intend, in good faith, to carry out the terms of this decree in the hopes that by so doing they may satisfy the clamor against their ownership of stockyards and their engaging in the distribution of the so-called unrelated lines in competition with the wholesale grocers.

X

You may ask what motive the Commission could have had for making a report which, if true, would cripple if not destroy these five packing companies. I have stated the facts as I know them. I can only infer the motives of the Commission from those facts. Any one else can draw inferences with the same validity that I do.

But when it is remembered that the Commission or its alter ego, Mr. Heney, announced in advance of taking evidence what that evidence would prove and denied the packers the opportunity of defending themselves; when it is remembered that the administration had taken over the railroads for government operation and possibly for government ownership; had taken over the telephone and telegraph companies; was engaged in the biggest shipping business the world has ever seen; and was engaged in and planning to engage in many other private enterprises; and, particularly, when it is remembered that the Commission did not have evidence to support its sensational charges, the suggestion forces itself upon me that the investigation of the packers was made by men who were more interested in convincing the public of the necessity for governmental operation of the instrumentalities of production and distribution than in ascertaining and publishing the truth about the packing industry.

At the coming session of Congress a drive will be made to pass additional legislation to supervise and regulate the packing business, not to protect public health (that is already fully protected by law), but for the purpose of giving the government—that is, some man or group of men, with human interests, passions, and desires, appointed to pay off some political debt and not because of any especial fitness, or worse, an obscure clerk hidden in some corner of a governmental bureau—the control of an industry, in many respects the largest and most complicated in the country, certainly the most sensitive to the law of supply and demand. It is proposed that this official or commission, whichever it may be, shall have greater power than was ever before conferred by Congress upon any man or group of men. He will have the power to legislate, to prosecute, and judge. He can give success to a friend or ruin a foe. He can so hamper the industry as to affect the meat supply of the nation, even of the world.

The Federal Trade Commission and those who urged the passage of the Sims Bill, which provided for governmental ownership and operation, are now urging the enactment of the milder

Gronna and Anderson bills. It is fair to assume that they have not changed their opinions, but that, unable for the present to secure the legislation they have at heart, they favor any bills which provide for government dictation in private business, hoping that such legislation may prove a stepping-stone toward the goal they seek.

If you believe in bureaucratic interference with and control of private business, you will be for this and similar legislation. If you believe in private initiative and in private ownership, then you should be against it.

At this late day, more than two years after publication of the Federal Trade Commission's report, it is no longer a question of the guilt or innocence of the packers. The question today is whether legislation establishing a governmental bureau to control and regulate a private business is advisable. If the charges made by the Federal Trade Commission against the packers were true, there are already sufficient laws upon the statute books under which they could be prosecuted and punished. On the other hand, if the charges of the commission are not supported by the facts, then likewise, there is no justification for any such revolutionary legislation.

XI

In closing, I wish to say that the packers have not opposed the Federal Trade Commission because of any desire to prevent progress in the industry, nor because of any opposition to co-operation with the producers, with the wholesale grocers, or with the consumers in solving problems of mutual interest. The packers recognize that there are problems, but they realize that these problems are economic and that they have no immediate control over them. They cannot compel people to eat meat when they have misjudged the demand and shipped too much; they cannot regulate the shipments of live stock by millions of independent producers, so as to avoid gluts or scarcities in the live stock market; but they object to being made the victims of designing demagogues who play upon the ignorance of the public for their own selfish purposes. The packers are for progress; they are for the solution of the problems confronting the industry, and they would welcome assistance from the Federal Trade Commission, or from any other governmental body, in solving these problems. Likewise they desire to co-operate frankly and honestly with the producers, the consumers and all others engaged in the industry or dependent upon it.

THE PACKERS AND THE PUBLIC

WALTER L. FISHER

The recent investigation of the packers by the Federal Trade Commission, as seen from the point of view of counsel for Swift & Company, is fitly presented by Mr. Henry Veeder. The editors of the *LAW REVIEW* may be right, however, in believing that the judicious seeker after truth should have an account of the same matter from the point of view of counsel for the Market Committee of the National Live Stock Association. There is more than a whole hemisphere of truth of which Mr. Veeder's paper gives no hint. There is much that is highly controversial in what he says, but my principal concern is with what he omits saying. As I am chiefly interested in constructive results, I shall try to avoid the controversial matters. Fortunately, the really important facts have been established beyond a reasonable doubt.

I agree with Mr. Veeder in objecting to Mr. Heney's very free comments upon the evidence, in the course of the *ex parte* public hearings which he conducted. I expressed my objection at the time. I believed then, and believe now, that, notwithstanding the very great provocation created by the conduct of the packers themselves, Mr. Heney's method of retaliation was wrong in principle and a serious tactical mistake. It furnished to the packers an opportunity (which they and Mr. Veeder have been using ever since) to divert public attention from the remarkably effective investigation and the exceedingly valuable constructive report of the Commission. Mr. Heney used his drag-net rather ruthlessly, and it sometimes slipped, as in the case of Mr. Veeder's vault. It dragged into the light a lot of inconsequential small fry, but it did get some very large and predatory fish.

First, with respect to the procedure of the Federal Trade Commission: Mr. Veeder's objection to the *ex parte* character of the investigation does not seem to be sound. This was an "investigation," and not a "hearing," and this is not a mere play upon words, for unless Mr. Veeder is himself making a sharp distinction between "investigation" and "hearing," he is wrong in asserting that "the Federal Trade Commission Act contains no authority for *ex parte* hearings, and that "the act provides for only one kind of *hearing*, and the respondent is given the right to appear and defend." The

Federal Trade Commission Act (sec. 6) expressly authorizes the Commission—

“(a) To gather and compile information concerning and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations, and to individuals, associations and partnerships. . . .

“(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation. . . .

“(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress, and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.”

The investigation of the packers was directed by the President under the express authority of paragraph (d) above quoted. He clearly distinguished between this investigation which he was directing and the ordinary procedure of the Commission upon charges against particular individuals or corporations with respect to alleged violations of the law. The President, in his letter to the Commission, said:

“I am aware that the Commission has additional authority in this field through the power conferred upon it, to prevent certain persons, partnerships or corporations from using unfair methods of competition in commerce. I presume that you may see fit to exercise that authority upon your own initiative, without direction from me.”

In other words, while the investigation might have resulted in specific charges and formal hearings, at which the respondents would have been entitled to the right to appear by counsel and make their defense, these were not hearings of that kind. The President's direction was as follows:

“Pursuant to the authority conferred upon me by the act creating the Federal Trade Commission, therefore, I direct the Commission within the scope of its powers to investigate and report the facts relating to the production, ownership, manufacture, storage and distribution of foodstuffs, and the products or by-products arising from or in connection with their preparation and manufacture; to ascertain the facts bearing on alleged violations of the anti-trust laws, and particularly upon the question whether there are manipulations, controls, trusts, combinations, conspiracies or restraints of trade out of harmony with the law or the public interest.”

The President further said:

"No business can be transacted effectively in an atmosphere of suspicion. If the allegations are well grounded, it is necessary that the nature and extent of the evils and abuses be accurately determined, so that proper remedies, legislative or administrative, may be applied."

The *fundamental* purpose, then, of the investigation was constructive, not punitive—the determination and application of legislative or administrative remedies, not the filing of specific charges (although specific charges would have followed if it had not been for the "consent decree"). This was the purpose also of those who sought and supported the investigation, including consumers as well as producers; for, while the American National Live Stock Association furnished effective leadership, it has had the constant support of the National Consumers' League, and many others representing the great consuming public. The Market Committee of the American National Live Stock Association will appreciate Mr. Veeder's tribute to the effectiveness of its leadership, but will correctly insist that he is not justified in his insinuation that the great mass of the live stock producers of the country have not been in accord with the work of the committee. I have personally attended several annual meetings of the Association, and in spite of the extraordinary use by the packers of their extraordinary sources of financial and personal influence upon many individual producers, there can be no question of the almost universal conviction of the producers that the live stock market has been restricted and controlled by artificial and illegal means, and that appropriate remedies must be found if an adequate supply of meat animals is to be assured at prices fair to the consuming public.

And let no one be deceived as to the alleged readiness of the packers to have an effective investigation. Like Davey Crockett's coon, they have come down out of the tree when they were about to be shot, but not before.

I have represented the Market Committee since its formation in 1916, and my first effort was to induce the packers to join in securing a congressional appropriation for a *constructive* investigation by the Federal Trade Commission. They insisted not only that no investigation was needed or proper, but that if one was to be had it should be conducted by the Bureau of Markets in the Department of Agriculture, which had no authority to require the production of books and papers or to examine witnesses under oath. The efforts they made and the money they spent and the secret influences they

set at work to defeat an effective investigation, were positively amazing, as was indisputably revealed later, by Mr. Heney's examination of written records and living witnesses. Space will not permit the recounting of the sordid but instructive story. Mr. Swift did write the Federal Trade Commission the letter that Mr. Veeder quotes; but the following extracts from a confidential report signed by R. C. McManus, general attorney; J. M. Chaplin, manager of accounts; and Arthur D. White, in charge of advertising and publicity, all of Swift & Company, copies of which report were sent to the other four big packing houses, will furnish illuminating information:

"If we are to avoid indictments, we must immediately decide upon such steps as will—

"First, bring better feeling, by showing a disposition to co-operate;

"Second, get something co-operative started which cannot be finished for some time;

"Third, see that our friends in these cattle organizations do organize, so as to discredit and undermine Walter Fisher, deRicqles and the Jastro conspiracy;

(Note: The story of the subsequent dalliance of deRicqles with the packers is an amusing and instructive incident, which it is a pity not to have the space to tell.)

"Fourth, get together all the political strength to persuade the sub-committees of the Judiciary Committee not to report out the Borland resolution unless necessary to prevent a bill for congressional inquiry;

"Fifth, to so combine the question of the packers' investigation with the more comprehensive scheme mentioned by Fisher that the whole undertaking will appear so colossal as to be unattractive;

(Note: Does this explain Mr. Veeder's advocacy of an investigation 'from the calf to the beefsteak'?)

"Sixth, see if the Bureau of Markets cannot be induced to start to publish data and familiarize itself with the situation to such an extent that it will begin to represent the cattlemen in all disputes."

The report also contained the following significant statement:

"We believe the situation to be serious, and recommend that due consideration be immediately given to it, and that everything be done in every direction to head off the present movement and to relieve the tension. We believe that, as it stands today, nothing could stop criminal prosecution, and that the situation is dangerous."

Mr. Arthur Meeker, vice-president of Armour & Company, also wrote to F. E. White, confidential political agent, as follows:

"We all agree it necessary to flood the Judiciary Committee with telegrams from all parts of the country, especially from districts which its members represent, protesting against the Borland resolution on the

ground that the investigation will destroy present satisfactory conditions."

And if the Federal Trade Commission expressed unfavorable opinions of the packers in the course of its investigation, it is only fair to state that the packers spent almost incredible sums in counter propaganda, and resorted to methods which justly aroused the indignation of the Commission. In its report to the President the Commission presented the following justification:

"The Commission, through Mr. Heney, had to meet deliberate falsification of returns properly required under legal authority; we had to meet schools for witnesses, where employes were coached in anticipation of their being called to testify in an investigation ordered by you and by the Congress of the United States; we had to meet a situation created by the destruction of letters and documents vital to this investigation; we had to meet a conspiracy in the preparation of answers to the lawful inquiries of the Commission. We will not trespass upon your time to go into details as to the legal and business ethics employed, but, on the foregoing statement, which we are prepared to substantiate in every detail, we contrast the ethics of the Commission's legal and investigating staff with the legal staffs of the five great companies."

The Commission also said that, at the beginning of its investigation, it attempted to proceed on the assumption that the officials of the big packing companies could be relied upon to furnish accurate and reliable information, and that their records were kept in such a way as to reveal the true state of their affairs; but that—

"It was soon demonstrated that the records of the companies, particularly as regards stockholders' lists and other evidences of ownership, were constructed to conceal rather than reveal facts; that important documents had been removed from their proper places in the files, and that the reports of some of the most important corporations and the statements of their officials could not be accepted. Thus, Armour & Company, in their report attested by the vice-president, Arthur Meeker, among other falsifications, omitted the company's interest in the Chicago Stock Yards, amounting to \$1,552,000, although the treasurer of the company testified that the transfer of this property from J. Ogden Armour to the company had been made prior to the time the report was prepared. That the omission was wilful, and part of a general plan to conceal the interest in the stock yards, is evidenced by the fact that admission of Armour's interest was made only when the Commission's examiner was on the point of discovering the truth, and that Arthur Meeker, on June 6, 1916, stated before the Committee on the Judiciary of the House of Representatives that 'the Armour people have no interest in the Chicago Stock Yards.'"

Keeping in mind Mr. Meeker's erroneous statements before the congressional committee, it is interesting to note that in a letter

from McManus to Veeder the former stated, with reference to the question of the ownership of the stock yards by the packers: "This can probably be met by argument or a statement by Mr. Meeker." Mr. Veeder may be right as to the effect of the utterances of the Federal Trade Commission upon the foreign trade in packing house products; but that is a claim that could always be made by the monopolist. And the methods of our packers in Australia, South America and England had already been investigated to their detriment. In the long run our foreign trade will not be hurt by a thorough house cleaning here at home.

We are also asked to pity the poor packer because he must sell his fresh meat before it spoils, even if he has to cut prices to do it; but never a word of sympathy for the live stock producer whose steers once ready for the market must be sold to avoid loss and which—once loaded for the stock yards—will in a few days, unless they are sold for whatever they will bring, lose in weight and cost of feed and keep more than the entire profit of months, perhaps years, of labor and investment.

Mr. Veeder naively says that the small group of live stock producers to whom he attributes this misguided investigation, *claimed* that "the fluctuations in the market price for live stock were due to the selfish motives of the packers." It is difficult to think that Mr. Veeder has any doubt that the suspicions of the producers were amply justified. He was counsel and some time defendant in court proceedings, and a participant in pools and conferences, about which it is not necessary to go beyond the records of the courts, the contents of written documents, and the testimony of living participants.

The story began in 1885, but it continued down to and throughout this very investigation, and its details are fully revealed in Part II of the report of the Federal Trade Commission, and in the statement of its Chairman, Mr. William B. Colver, before the House Committee on Interstate and Foreign Commerce, on January 3, 1919. In 1885 the Dressed Meat Pool was formed, and its members were Swift & Company, Armour & Company, S. W. Allerton, Morris & Company, and Hammond & Company. The Cudahy Packing Company was not represented. The Allerton Company was later absorbed by Morris & Company. This pool was based on the sale of meat and not on the purchase of live stock. It was investigated by a special Senate committee, which reported unanimously, in 1890, that there was convincing proof of collusion with respect to first, the fixing of beef prices; second, the division of territory and

business; third, the division of certain public contracts; and, fourth, the compulsion of retailers to buy beef from the members of the pool.

The operations of the Dressed Meat Pool were among the reasons for the passage of the Sherman law. Its exposure was followed, in 1893, by the Veeder pool, so-called for the reason that Henry Veeder was the secretary, and to an extent the clearing house for the pool's operations, which were admitted and explained by the testimony of Mr. Veeder himself in the National Packing Company case, given after the statute of limitations had run. He testified that from 1893 to 1896 the representatives of Armour, Swift and Morris met regularly in offices occupied in part by Mr. Veeder's father, who was then counsel for Swift & Company. Various ingenious devices were operated by Mr. Veeder for the division of territory and business. Meanwhile, Schwarzschild and Sulzberger (now Wilson & Company) had broken into the business, as competitors, to such an extent that this pool became ineffective and ceased to operate, in 1896. On January 1, 1897, however, a new combination, in the form of a statistical bureau, was organized, with Veeder as secretary; and in January, 1898, a new pool, to continue for three years, was formed by the same interests as in the old pool, with the addition of Schwarzschild and Sulzberger. In this latter pool the two features, which apparently have continued down to our latest investigation, were introduced. They were the 'margin system' and 'the full-capacity plan.' The margin system was the adoption of a uniform method of figuring costs, which was given out to salesmen as the cost of meat, the selling prices being based on instructions to branch-house managers to work for costs, or costs plus or minus certain percentages—costs having been figured on an arbitrary basis generally in excess of the actual cost of the fresh meat.

The packers have always laid great stress on the fact that they did not agree upon the exact prices for which the meat should be sold, but in this they were merely making a virtue of necessity, because of the great variations in the quality of meats and the necessity of disposing of them within the periods in which they could successfully be sold in the various consuming markets. There are some laws of supply and demand which no monopolistic combination can successfully evade. The Full Capacity Plan used the supposed capacities of the various existing packing plants as the basis for the division of business; and it is believed that the latest combination is based upon the maintenance of fixed percentages, within practicable limits.

Early in 1902 there was so much agitation in the newspapers and in Congress that, on April 13, 1902, the then existing pool was liquidated, and Mr. Veeder destroyed all memoranda, letters, etc., which had been kept at the meetings between 1893 and 1902.

On May 10, 1902, the Department of Justice filed a bill for injunction against the members of the Veeder pool, and on appeal to the Supreme Court of the United States a sweeping injunction was entered under its decision of January 30, 1905.¹ The packers, however, had, as usual, anticipated the court and devised a new combination. On May 31, 1902, a few days after the preliminary injunction had been issued, a contract was signed by J. Ogden Armour, Gustavus F. Swift and Edward Morris, as *individuals*, by which it was agreed to form a holding corporation, under the laws of New Jersey, to which each of the parties was to sell the shares of capital stock that he held in certain meat-packing and other companies. Each of the parties subsequently deposited with the Illinois Trust and Savings Bank one million dollars as a forfeit for any breach of this contract. The parties to this combination also agreed to purchase for the new corporation various competing concerns, many of which were so acquired. Later, in 1902, Michael Cudahy and Ferdinand Sulzberger were brought into the new merger, and Kuhn, Loeb & Company, through Jacob Schiff, was to make a loan of \$60,000,000. The whole thing, however, fell through, on account of the panic of 1903.

On March 18, 1903, the National Packing Company was incorporated, and the various former competitors of the big packers which had been bought up were turned over to the National Packing Company. The stock of the National Packing Company was not distributed, however, on the basis of what had been paid for these former competitors by the purchasing parties, but on an agreed basis of percentages, apparently relating to some division of business. The big packers were indicted by the federal grand jury, but the fact that evidence was used against them which they had been compelled to furnish to Commissioner Garfield, supplied them with the successful defense of the 'immunity bath.'

The National Packing Company now furnished a useful substitute for previous pools, in that on its Board of Directors sat J. Ogden Armour, Gustavus F. Swift, Edward Morris, Thomas E. Wilson and other representatives of the big packing concerns, including Albert H. Veeder. They still met in Veeder's office,

1. See *Swift & Co. v. United States*, 196 U. S. 375.

where they decided upon the policies and prices which it seemed wise to have the National Packing Company maintain. And, of course, once convinced as to what it was best for the National Packing Company to do, its directors would naturally follow the same policies in the conduct of the larger concerns with which they were connected. This clever arrangement, however, soon attracted the attention of the government, and led first, to the criminal trial, in which the packers were acquitted, then to civil action and the voluntary dissolution of the National Packing Company, at the instance of the government, in 1912. The dissolution, however, merely distributed the properties of the National Packing Company between Armour, Swift and Morris. It did not restore the competition which the formation of the National Packing Company had destroyed. We have not yet discovered how to restore competition in an industry which has once been brought under monopolistic control.

New conferences of the packers promptly succeeded. Among the interesting documents discovered by the Federal Trade Commission was what it calls the 'black book.' This was a private memorandum book, kept by Germon F. Sulzberger, in which he set down with considerable care a diary of various conferences, beginning in January, 1913, and continuing until March, 1916. It is printed in full, as 'Exhibit 1,' of Part II of the Report of the Federal Trade Commission, and occupies twenty-eight pages in small type. It is very interesting reading, as is the mass of evidence bearing upon the concerted action of the packers throughout the war.

It can all be summarized in the incontrovertible statement that, whether or not there has been and is now a definite conspiracy in restraint of trade, there exists in the meat-packing business in the United States no real competition sufficient either in character or degree to afford a sound economic basis for the great fundamental industry of producing live stock and supplying its meats and other products to the community. The five large packing concerns do now substantially control the marketing of live stock and of meats and other products derived from live stock, and they have already extended this control to many other foods and food products and are rapidly increasing their general food business. In the interests of producer and consumer the government must effectively regulate them so far as they are or tend to be a monopoly, and must prevent the extension of this monopoly and must—if it can—destroy it by opening the doors to competition. It is immaterial whether the monopoly is complete or whether it is brought about by direct con-

spiracy, agreement or understanding between the parties to it, or by methods of business and concerted action in matters in which there so clearly exists a community of interests.

The founders of the big meat-packing concerns undoubtedly established a service of very great economic value to the community and were entitled to their reward. Changing conditions with respect to the sources of live stock and the principal centers of meat consumption have probably lessened the economic value of the system they established and it is beyond doubt that, with enormous growth in volume of business and in wealth and power, abuses have crept in that should not be tolerated and that need not be tolerated on any theory that their removal will threaten the proper performance of the really useful, economic functions of the packing industry. A surgical operation may be best for the future relief of the patient. The question is whether a surgical operation is necessary, or whether milder methods of treatment will succeed.

The really important matters covered by the investigation of the Federal Trade Commission are scarcely mentioned by Mr. Veeder, and the remedies proposed by the Commission are neither clearly nor fairly presented. It may be that Mr. Arthur Meeker's testimony before the congressional committee correctly reflects the attitude of Mr. Veeder and his associates toward the economic problem. During the Borland hearings I had been struggling in vain to ascertain how the packers themselves *thought* they determined what they would pay for live stock or what they would charge for meat. Mr. McManus, attorney for Swift & Company, had said:

"The wholesale beef market immediately reflects it (a fluctuation in the price of cattle), rather, that is putting the cart before the horse; the cattle market immediately reflects the beef market. Whenever there is a declining cattle market it is also accompanied by and *preceded* by a declining beef market."

This, it will be noticed, is no careless statement of an economic process. It is an attempt to be very precise and accurate; but Mr. Arthur Meeker, vice-president of Armour & Company, and at the time the principal spokesman for the packers at Washington, referring to the situation when cattle are cheap and beef is high, said: "It shows that the price of beef *follows* the price of cattle."

Here was a direct conflict, and in order to set the matter right, I put two questions to Mr. Meeker:

"Q. Cannot you give the Committee a better indication, from your long experience in the packing market, as to the economic laws that underlie this market proposition?"

"A. There is not any.

"Q. No economic principles at all?

"A. There are none."

What the producers have been trying to do is to introduce a few sound economic principles into the marketing operations of the business. They are convinced that there is no adequate economic justification for the huge margin between what the producer gets and what the consumer pays. They believe that existing retail methods are economically unsound, but that before it is practicable to effect any fundamental improvement in these methods the packing business itself must be brought under regulation and control. They have never advocated government ownership or operation of the packing plants, notwithstanding widespread misrepresentation to this effect. There exist in this country no more stubborn believers in the doctrines of individualism than the farmers and ranchmen. The Federal Trade Commission expressly repudiated any intention of recommending government ownership of the packing business. They did, however, regard it as essential for the public welfare that the big packers should be deprived of the present undue advantage over competitors, producers and consumers, which they derive from their ownership or control of the transportation and marketing facilities. They did propose that genuine competition shall be established as far as, and as fast as, this can be done, in an industry which has once been taught not to compete; and, that while this is being attempted and until it is successfully accomplished, the packers shall operate under license from the federal government, which license shall provide effective public regulation and control, including uniform accounting and publicity.

It must be remembered that when the Commission's report was made the government was operating the railroads; and that when the Commission recommended taking over the refrigerator cars and the stock yards as integral parts of the transportation system, it was not recommending continued government ownership of these facilities. The packers have controlled the market, in part by controlling the very instruments by which marketing is carried on. They have usurped the functions which properly belong to the railroads as common carriers: (a) by furnishing the rolling stock needed for carrying live stock and meat products; (b) by supplying the terminal facilities essential for receiving, storing and marketing live stock and meat products. That these functions properly belong to and should be performed by the transportation system of the country is clear. The Interstate Commerce Commission, in its Decision No. 4906,

In the Matter of Private Cars, decided, July 31, 1918, clearly states the reason why this is so (pp. 673-4), and explains that it is not done because "it has been held that, in the absence of discrimination, the power to enforce the duty does not rest with the Commission" (p. 671).

The furnishing of adequate terminal facilities for the handling of live stock is just as clearly a function of the carrier as is the furnishing of cars. The stock yard is essentially a depot or station for the loading and unloading and care of live freight at the end of the railroad haul, and is as much a part of the transportation service as is the freight house or other terminal facilities for the unloading and care of dead or inert freight. The same is true of the refrigerated terminal storage plants for meats. Competition can be most effectively encouraged by relieving prospective competitors of the packers of the burden of monopolistic control at the point where they buy their animals, and at the markets where they dispose of their products. But we may as well face the fact that the restoration of effective competition in a business which for thirty years has been taught how not to compete is more than doubtful; and that regulation must be made effective at least until that doubt can be resolved.

These things cannot be accomplished without additional legislation; and whether this legislation takes the form of the amended Gronna Bill, which has just (January 24, 1921) passed the United States Senate, or some other form, legislation will ultimately be enacted. It cannot be sidetracked, even by the consent decree which was entered by agreement between the packers and Attorney General Palmer. The court in which this decree is being enforced has already had to threaten to appoint receivers to take over the interest of the packers in the Stock Yards, because their plans for selling them are not satisfactory. Contempt proceedings for failure to comply with the provisions of the decree are a poor substitute for concurrent regulation by an administrative agency in close touch with the industry in the working of the normal processes of business. The Attorney General's office possesses no adequate machinery for this purpose. Its regulation must be after the event and punitive in character. This, however, is not the place for more than bare reference to the remedies that must be applied.

Mr. Veeder states that "two eminent counsel" (unnamed) reported to Attorney General Gregory that the evidence available would not justify court proceedings. He fails to state that shortly before the announcement of the "consent decree" the evidence was being presented to a federal grand jury by special counsel for the

government who expressed a very different opinion. However, it should be said again that punishment for past offenses is not the matter of most importance.

And now that counsel for the live stock producers has been heard, perhaps it is fitting to close with some extracts from the opinion which President Wilson, on September 11, 1918, secured from Mr. Herbert Hoover, who cannot be charged with any undue prejudice against the packers, and who, as Food Administrator, certainly had exceptional opportunity for observation.

"I scarcely need to repeat the views that I expressed to you nearly a year ago, that there is here a growing and dangerous domination of the handling of the nation's foodstuffs.

* * * * *

"It is a matter of great contention as to whether these five firms compete among themselves, and the records of our courts and public bodies are monuments to this contention.

"Entirely aside from any question of conspiracy to eliminate competition amongst themselves and against outsiders, it appears to me that these five firms, closely paralleling each other's business as they do, with their wide knowledge of business conditions in every section, must at least follow coincident lines of action and must naturally refrain from persistent sharp competitive action toward each other. They certainly avoid such competition to considerable extent. *Their hold on the meat and many other trades has become so large through the vast equipment of slaughter houses, cars, and distributing branches, and banking alliances which each of the five controls, that it is practically inconceivable that any new firm can rise to their class, and in any event even sharp competition between the few can only tend to reduce the number of five and not increase it.*"

* * * * *

"The problem we have to consider, however, is the ultimate social result of this expanding domination, and whether it can be replaced by a system of better social character and of equal economic efficiency for the present and of greater promise for the future. *It is certain, to my mind, that these businesses have been economically efficient in their period of competitive upgrowth, but as time goes on this efficiency cannot fail to diminish and, like all monopolies, begin to defend itself by repression rather than by efficiency. The worst social result of this whole growth in domination of trades is the undermining of the initiative and the equal opportunity of our people and the tyranny which necessarily follows in the commercial world.*"

* * * * *

Reviewing the recommendations of the Federal Trade Commission, he said:

"As to the first part of this recommendation, on car service, I am in full agreement, and may recall to you that soon after its installation we recommended that the Railway Administration should take over and

operate all private car lines in food products. This has, to some degree, been accomplished through their car-service division."

* * * * *

"As to the stock yards, I am in agreement that they should be entirely disassociated from the control of the packers."

* * * * *

"As to the recommendation that the Federal Government should at once take over the packers' branch houses, cold storage and warehouse facilities, I find much difficulty. I do not assume that the Trade Commission contemplates the government entering upon the purchase and sale of meat and groceries at these establishments."

* * * * *

"In summation, I believe that the ultimate solution of this problem is to be obtained by assuring equal opportunity in transportation, equal opportunity in the location of manufacturing sites and of terminal sites, and the limitation of the activities of these businesses."

* * * * *

"I would, in any event, separate the whole problem into a question as to what should be done as a war emergency and what should be done as a permanent solution of the whole question. I do not feel that the government should undertake the solution of the problem by the temporary authority conferred under the war powers of the Railway and Food Administrations, which must terminate with peace, but rather that it should be laid before Congress for searching consideration, exhaustive debate, and development of the public opinion, just as has been necessary in the development of the public interest in our banks, insurance companies and railways."

Since Mr. Hoover's letter was written there have been exhaustive congressional hearings, which Mr. Veeder says occupied "almost six months of actual time and their record required over nine thousand printed pages." At these hearings the packers personally and by counsel presented their evidence and arguments. Is it not time for constructive action?

JURISDICTION AND PROCEDURE OF THE FEDERAL TRADE COMMISSION

BY STANLEY B. HOUCK

The Federal Trade Commission was created by the Federal Trade Commission Act. This act of Congress was approved by the President September 26, 1914.

Congress has conferred additional power and jurisdiction upon the Commission by the so-called Clayton Act, which was approved by the President October 15, 1914; the Trading With the Enemy Act, approved October 6, 1917, and the Act to Promote Export Trade, approved April 10, 1918.

The Commission was organized March 16, 1915. Section five of the Federal Trade Commission Act reads in part:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

Section two of the Clayton Act relates to price discriminations; section three to contracts conditioned on non-use or non-dealing with a competitor's goods; section seven to acquisition of stock ownership in competing corporations, and section eight to common directors of competing corporations.

The power and jurisdiction of the Commission over unfair methods of competition is derived entirely from the Federal Trade Commission Act and the Clayton Act.

The Commission issued its first formal complaint February 18, 1916, nearly a year after its organization. Between that date and the close of its fiscal year, June 30, 1920, it had issued five hundred and seventy-two formal complaints for violation of section five of the Federal Trade Commission Act; thirty-three for violation of section two of the Clayton Act; seventy-nine for violation of section three of that act; twenty-one for violation of section seven and two for violation of section eight of that act.

One who believes that he, or the public, is being injured by unfair practices, may address the Federal Trade Commission with a brief statement of the facts. The Commission investigates the mat-

ter. If it ascertains that the facts stated are probably true, and has reason to believe that a formal inquiry is in the public interest, it issues a formal complaint in writing.

If, however, the Commission's investigation does not substantiate the statement filed with it, or "a proceeding by it in respect thereof would" not "be to the interest of the public," the proceeding is dismissed without annoyance to the respondent, without publicity and without public knowledge.

Complaints are issued in the name of the Federal Trade Commission as complainant.

The respondent has forty days in which to answer. A full hearing is then had. The respondent may be present in person and by attorney. He has every opportunity to cross-examine witnesses and examine documentary evidence. He has at his disposal the processes of the Commission for the production of his own witnesses and books, papers, or any other documentary evidence he desires to employ in his defense.

If the Commission, after the hearing is closed and the matter has been briefed and argued before it (if parties so desire to do), finds that the acts complained of have been committed and that they are contrary to the public interest, it issues an order to respondent to cease and desist from the practice complained of. If the Commission, on the contrary, finds that the acts complained of have not been committed, or, if committed may not properly be said to be unfair, the case is dismissed.

Thereafter the respondent may, if he believes that the decision is unfair to him, appeal to the Circuit Court of Appeals of the United States and thence to the Supreme Court of the United States.

The issuance of a complaint is not an adverse judgment. It is merely a resolution for an orderly trial. The order to cease and desist is neither in effect a civil judgment for the payment of money nor a criminal judgment imposing a fine or imprisonment.

The hearings of the Commission are usually held at a place convenient for respondent. In this regard his desires are usually complied with. The practice of the Interstate Commerce Commission is quite closely followed. An examiner of the Commission, sometimes a member of the Commission, presides at the hearing. The proceedings are reported in the usual way and a transcript thereof returned to the Commission and a copy thereof furnished to the respondent.

A noteworthy thing is that the name of the person or firm sub-

mitting the original statement to the Commission is never disclosed unless by its wishes or consent.

Between the time of its organization, March 16, 1915, and June 30, 1920, the Commission received and filed 1,990 applications for the issuance of formal complaints. Of these, 992 were dismissed after examination as being without merit or without the jurisdiction of the Commission; 537 were in process of examination.

Six hundred eleven formal complaints were issued during the period referred to; 327 of these had been disposed of; 284 were still pending June 30, 1920. Of those disposed of, 64 were dismissed because of failure of preponderating proof of the charges or because the respondent made a sufficient showing of defense. In the remaining cases, the order of the Commission to cease and desist was issued.

"And here," to use the language of one of the members of the Commission, "comes what I believe to be one of the greatest examples of the inherent fairness of the American business man, for out of 238 cases where the business concern after trial and hearing and having had brought home to it the consequences, often unsuspected, of its conduct upon competitors, 195 of the respondents have voluntarily agreed to accept the order to cease and desist and to stop the bad practice."

Among the methods of competition thus far condemned by the Commission may be mentioned the following:

Misbranding of articles as regards the materials or ingredients of which they are composed, their quality, origin, or source.

Adulteration of products, misrepresenting them as pure, or selling them under such names and circumstances that the purchaser would be misled into believing them to be pure.

Bribery of buyers or other employees of customers, with money, valuable presents, etc., to secure new customers or induce continuation of patronage; the payment of specified percentage of the purchase price of commodities to employees of customers who practically control the purchases through their recommendations. A variation of this practice is found in the practice sometimes indulged in of bribing an employee of a customer to introduce foreign substances into the product of a competitor, spoiling its usefulness and thus procuring the business of the concern. The Commission has suggested to Congress that a federal criminal law against commercial bribery should be passed and this suggestion has been vigorously approved by many great associations of business men.

The payment of bonuses by manufacturers to the salesmen of jobbers and retailers, with or without the knowledge of their employers, to procure their special services to push the goods of the manufacturer. This practice has long been in disfavor among the jobbers and retailers and the Commission has been assisting in ridding the trade of it. Akin to this practice is that of making very large contributions of money to conventions or associations of customers, though this practice has been prohibited only when associated with other practices all tending unduly to restrict competitive advantage.

Procuring the business or trade secrets of competitors by espionage on their plants, by bribing their employees, or by similar means.

Procuring breach of competitors' contracts for the sale of commodities, by misrepresentation or by other means.

Enticing away of valuable employees of competitors in such numbers as to disorganize, hamper or embarrass them in business.

Making of false or disparaging statements respecting competitor's products, his business, financial credit, etc.

False or misleading advertising. A few of the statements condemned have been those respecting prices at which goods are sold, methods employed in the advertiser's business, which, if true, would give it advantages over competitors in the matter of prices; misrepresentation that goods are sold at cost; false claims to government indorsements of products; and advertising special cut-price sales where goods are sold at the usual or ordinary prices.

Widespread threats to the trade of suits of patent infringement for selling or using alleged infringing products of competitors, such threats not being made in good faith, but for the purpose of intimidating the trade. False claims to patents or misrepresenting the scope of patents. Statements of this character have been at times sufficiently broad to give claimants a monopoly of an industry. The making of vague and indefinite threats of infringement suits against the trade generally, the threats being couched in such general language as not to convey a clear idea of the rights alleged to be infringed, but nevertheless causing uneasiness and fear in the trade.

Tampering with and misadjusting the machines sold by competitors for the purpose of discrediting them with purchasers.

Trade boycotts or combinations of traders to prevent certain wholesale or retail dealers or certain classes of such dealers from procuring goods through the usual channels.

Passing off of the products of one manufacturer for those of

another by imitation of product, dress of goods, or by simulation of advertising or of corporate or trade names.

Misrepresenting the materials of which competitor's products are composed, and the financial standing of competitors; preventing competitors from procuring advertising space in newspapers or periodicals by misrepresentation respecting their financial standing or other misrepresentation calculated to prejudice the advertising medium against them.

Misrepresentation in the sale of the stock of corporations.

Sale of rebuilt articles of various descriptions—for example, rebuilt automobile tires, and of old motion picture films slightly changed and renamed—as and for new products.

Harassing competitors by fake requests for estimates on bills of goods, for catalogs, etc.

Giving away goods in large quantities to hamper and embarrass small competitors.

Sales of goods at or below cost to accomplish the same result.

Sales of goods at or below cost, as "leaders," coupled with statements misleading the public into the belief that they were sold at a profit by reason of the seller's superior facilities for manufacturing, purchasing, etc.

Bidding up the prices of raw materials to a point where the business is unprofitable for the purpose of driving out financially weaker competitors.

Loaning, selling at cost, or leasing to dealers, at nominal considerations, storage and merchandising outfits such as pumps and tanks for gasoline and coffee-urns for coffee, on the condition that they be used only in the distribution of the products of the manufacturer.

The use by monopolistic concerns of concealed subsidiaries for the carrying on of their business, such concerns being held out as not connected with the controlling company.

Intentional appropriation or converting to one's own use of raw materials of competitors by diverting shipments, etc.

Giving and offering to give premiums of unequal value, the particular premium received to be determined by lot or chance, thus in effect setting up a lottery.

Any and all schemes for compelling wholesalers and retailers to maintain resale prices on products fixed by the manufacturer.

Combinations of competitors to enhance prices, maintain prices, bring about substantial uniformity in prices, or to divide territory or allot customers.

In addition to the practices already enumerated, there have been cases where a number of practices associated together were condemned because of their combined effect unduly to restrict competitive opportunity and where it could not be said probably that any single practice standing alone would have been condemned.

When a large number of complaints come to the Commission touching a given industry, or when a complaint is made alleging an unfairness of some practice which is either an ancient practice or one almost universally employed, and the Commission feels that a single case may not present all the facts and that a decision upon the facts involved in an individual case would tend to be harmful rather than helpful, it employs a procedure which it has called Trade Practice Submittal. This procedure has also been employed by the Commission in a number of instances at the request of the industry itself.

The proceeding is to invite as complete and as representative body of men as possible in the industry to meet with the Commission and there discuss frankly and fully any and all practices which the industry, and not the Commission, may have questioned as to whether they are fair and good or bad and useless; or whether they are unfair. Open and free discussion is invited and in the end, the Commission makes no decision or ruling nor any expression of opinion, but asks the meeting to say out of the experience and technical knowledge of the members of the industry, what are good things and what are bad things. This decision of the industry itself is taken by the Commission as a guide and thereafter if business concerns complain that practices which have been deemed unfair by the industry itself are being indulged in, the Commission will assume that there is sufficient reason to believe that such practices are bad, and, without a long preliminary examination, bring the contested practice to issue so that it may be tried out in an orderly way according to the formal proceedings which have heretofore been described.

Though the Commission was organized in the spring of 1915, only one decision of the Supreme Court of the United States has thus far been had interpreting the provisions of section 5 of the Commission's organic act. This decision actually determined only a point of pleading—that is, the court held that the Commission had not pleaded that the particular practice had a dangerous tendency actually to restrict competition. It appears from the opinion, however, that the court is inclined to establish two classes of practices as being in violation of the Act. First: Those practices which have

heretofore been regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression. Second: Practices regarded as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. Apparently, if a practice have this dangerous tendency it will be regarded by the court as in violation of the Act, even though not heretofore declared to be an unfair method of competition.

By far the greater part of the practices thus far condemned by the Commission fall within the first class described by the court. Some of them depend for their unfairness, however, on their tendency unduly to hinder competition. Whether such a practice has this tendency depends on the proof in the particular case.

For centuries the basic principle underlying British and American business has been the principle expressed by the term competition. It has for hundreds of years been recognized by the lawmakers as the representatives of the consuming public, that the two alternatives confronting them in regard to business are competition or regulation. If there is competition, regulation is unnecessary and useless. If there is no competition, if there is monopoly, there must be a stepping into the business by the public authorities who will either regulate the business thenceforth, as in the case of public utilities, or seek to restore competition by a breaking up of monopolies into the component parts, as we have endeavored to do with our adjudged monopolies.

Our experience with the various business which have been found to be monopolistic has not been satisfactory. When we take the machinery of monopoly apart, the pieces do not function satisfactorily as independent competitive entities.

Moreover, our method of handling monopolies savors uncomfortably closely of locking the barn after the horse is stolen. We have allowed monopolies to grow up. We allow ourselves to be victimized by them until conditions become unbearable. Then we go upon a wrecking expedition.

It is the function of the Federal Trade Commission to prevent unfair methods of competition. Every monopoly ever condemned by our courts has been found as a fact to have become a monopoly through the use of unfair methods of competition. Every decree of state or federal court directed toward monopolies or toward restraints of trade generally has explicitly enjoined the respondent from further practicing methods of business of exactly the same character as those against which the formal complaints and the

orders to cease and desist of the Federal Trade Commission are directed.

It is obviously the progressive and constructive thing to prevent unfair methods of competition in the first instance, and in the second, by preventing such methods to make impossible the growth of monopolies and the existence of restraints of trade and commerce. Such was the purpose and object of creating the Federal Trade Commission and of the power and jurisdiction conferred upon it.

In the performance of its duties the Commission is called upon to apply to business a combination of the principles of law and economics which is frequently wholly misunderstood by lawyers and their clients. The lawyer finds that the old principle he has tied to so long and so successfully, that one may contract as and with whom he pleases, or may refuse to contract at all, is sometimes lost to his hand. The business man is suddenly told that he must stop the practices which he and his competitors have engaged in as long back as memory runs. In the exaggeration of his anger when he has been ordered to cease from commercial bribery, he attacks the Commission as preventing him from entertaining a customer with a meal, a cigar, a visit to the theater.

Both the lawyer and the business man must be educated. The lawyer must bestir himself and come to a realization that in the exercise of the police power, what would otherwise be lawful is forbidden if it has the effect of stifling and suppressing competition. The business man must come to see that competition requires him to clash and contend for business with his competitor in the open and on the merits and not in sly and underhanded ways too devious and wicked to be followed.

The Commission has been the object of well organized attacks. These attacks need no answer.

No honest, reasonable minded lawyer or business man will publicly state, nor even privately believe, that any one of the various practices in competition which have been enumerated and condemned by the Commission are proper, fair, or necessary or desirable in business. If he did believe any such thing he may turn to the decrees of the courts in the anti-trust cases and find them each and every one condemned in unmeasured terms. But if they be read and studied they publish their own impropriety. They speak for themselves.

No one has ever attacked the Commission unless he or his client has been charged with an unfair act. The attacker never claims

the act charged against him is fair. He invariably attacks the methods used in bringing the practice to bar. So does the criminal feel toward the detective who unearths his crime and the public attorney who prosecutes the case to final punishment. It is not the law the accused objects to. It is the discourtesy of the public agent in applying it in any particular case that is so obnoxious.

The attackers are not consistent. It is hardly believable that they can feel that, with all the safeguard of appeal, they will be found guilty of acts they have not committed. And they do not assert that acts clearly unfair are fair. While complaining of animus and persecution and interference with business freedom, their prayer for relief is not that methods of approaching the guilty be changed or that men without animus be put in office, but that the law be repealed and the whole scheme wiped out.

The plan is too obvious. It has been resorted to too frequently to mislead anyone who informs himself. Every commission ever created to regulate anybody or anything has had to bear with the same sort of attacks until the public came to understand it and its purposes, and offenders against the law it was charged to enforce learned they must regard as public rights some things they would like to believe "was their own business."

No one needs be misled. He need only to go to the root of the matter and determine for himself whether the practices declared by the Commission and the courts to be unfair and subversive of the public interests, ought to be permitted to be practiced. If they should not be allowed to exist, some body such as the Federal Trade Commission must be charged with the duty of preventing the practices.

If the Commission is misconducting itself in the performance of its duties, the remedy is not the wiping out of a law to prevent unfair methods in competition.

LAW FROM LAY CLASSICS¹

I

OF A COURT MERCHANT²

By DANIEL DEFOE

I ask pardon of the learned gentlemen of the long robe if I do them any wrong in this chapter, having no design to affront them when I say that, in matters of debate among merchants, when they come to be argued by lawyers at the bar, they are strangely handled. I myself have heard very famous lawyers make sorry work of a cause between the merchant and his factor; and when they come to argue about exchanges, discounts, protests, demurrages, charter-parties, freights, port-charges, assurances, barratries, bottomries, accounts current, accounts in commission, and accounts in company, and the like, the solicitor has not been able to draw a brief, nor the counsel to understand it. Never was young parson more put to it to make out his text when he has got into the pulpit without his notes, than I have seen a counsel at the bar when he would make out a cause between two merchants; and I remember a pretty history of a particular case, by way of instance, when two merchants contending about a long factorage account that had all the niceties of merchandising in it, and labouring on both sides to instruct their counsel and to put them in when they were out, at last they found them making such ridiculous stuff of it that they both threw up the cause and agreed to a reference; which reference in one week,

1. [This series reproduces, from time to time, some of the choice passages in lay classics, where the law or our profession has been treated in satiric or philosophic vein. The series is renumbered consecutively in each volume of the REVIEW.—EDS.]

2. In this passage, the author of Robinson Crusoe makes a plea for the establishment of a mercantile court. The idea advanced finds a certain correspondence in the French *tribunaux de commerce* and the German *Handelsgerichte* of the present day, as also something like precedent in the old English courts of piepowder. The only approach to a mercantile court in England or America is the so-called "Commercial Court" established by the judges of the Queen's Bench Division of the English High Court of Justice in 1895. This is not a separate court, but a branch of the King's Bench Division, in which a judge is permanently delegated to hear commercial causes under rules of procedure somewhat simpler than those applicable in ordinary cases.

[The tractate in question is contained in "An Essay on Projects," published in 1697, and is here reprinted from Henry Morley's *Earlier Life and Chief Works of Daniel Defoe* (London, Geo. Routledge & Sons, 1889).—R. W. M.]

without any charge, ended all the dispute, which they had spent a great deal of money in before to no purpose.

Nay, the very judges themselves (no reflection upon their learning) have been very much at a loss in giving instructions to a jury, and juries much more to understand them; for when all is done, juries, which are not always, nor often indeed, of the wisest men, are, to be sure, ill umpires in causes so nice that the very lawyer and judge can hardly understand them.

The affairs of merchants are accompanied with such variety of circumstances, such new and unusual contingencies, which change and differ in every age, with a multitude of niceties and punctilios, and those again altering as the customs and usages of countries and states do alter, that it has been found impracticable to make any laws that could extend to all cases; and our law itself does tacitly acknowledge its own imperfection in this case by allowing the custom of merchants to pass as a kind of law in cases of difficulty.

Wherefore it seems to me a most natural proceeding that such affairs should be heard before and judged by such as by known experience and long practice in the customs and usages of foreign negoce are, of course, the most capable to determine the same.

Besides the reasonableness of the argument, there are some cases in our laws in which it is impossible for a plaintiff to make out his case or a defendant to make out his plea; as, in particular, when his proofs are beyond seas; for no protests, certifications, or procurations are allowed in our courts as evidence; and the damages are infinite and irretrievable by any of the proceedings of our laws.

For the answering all these circumstances, a court might be erected by authority of Parliament, to be composed of six Judge Commissioners, who should have power to hear and decide as a Court of Equity, under the title of a Court Merchant.

The proceedings of this court should be short, the trials speedy, the fees easy, that every man might have immediate remedy where wrong is done. For in trials at law about merchants' affairs, the circumstances of the case are often such, that the long proceedings of Courts of Equity are more pernicious than in other cases, because the matters to which they are generally relating are under greater contingencies than in other cases, as effects in hands abroad which want orders, ships and seamen lying at demurrage, and in pay, and the like.

These six judges should be chosen of the most eminent merchants of the kingdom, to reside in London, and to have power by commission to summon a council of merchants, who should decide

all cases on the hearing of both parties, with appeal to the said judges.

Also to delegate by commission petty councils of merchants in the most considerable ports of the kingdom for the same purpose. The six judges themselves to be only judges of appeal; all trials to be heard before the council of merchants, by methods and proceedings singular and concise. The council to be sworn to do justice, and to be chosen annually out of the principal merchants of the City.

The proceedings here should be without delay, the plaintiff to exhibit his grievance by way of brief, and the defendant to give in his answer, and a time of hearing to be appointed immediately. The defendant by motion shall have liberty to put off hearing upon showing good cause, not otherwise. At hearing, every man to argue his own cause if he pleases, or introduce any person to do it for him.

Attestations and protests from foreign parts regularly procured and authentically signified in due form to pass in evidence; affidavits in due form, likewise attested and done before proper magistrates within the King's dominions, to be allowed as evidence.

The party aggrieved may appeal to the six judges, before whom they shall plead by counsel, and from their judgment to have no appeal.

By this method infinite controversies would be avoided and disputes amicably ended, a multitude of present inconveniences avoided, and merchandising matters would in a merchant-like manner be decided by the known customs and methods of trade.

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RECENT CASES

[Contributed by the Undergraduate Board]

CONSTITUTIONAL LAW—POWER OF A STATE TO ENACT STATUTES DEALING WITH THE RIGHT OF FREE SPEECH.—One Gilbert took occasion in the recent world war to make a speech in the state of Minnesota in which he criticised the conduct of the war, and particularly the feature of conscription. Minnesota had passed a statute making it unlawful "to interfere with or discourage the enlistment of men in the military or naval service of the United States or of

the State of Minnesota." One of the sections provided that speaking by word of mouth against enlistment was unlawful.

Gilbert's speech contained the usual verbiage of pacifism relative to pulling England's chestnuts out of the fire, and to the fact that wealth should be conscripted as well as men. He was indicted under the statute and his demurrer being overruled, and that judgment being affirmed by the Supreme Court of Minnesota, the case was presented to the Supreme Court of the United States (*Gilbert v. State of Minnesota*, 41 Sup. Ct. Rep. 125) on the theory that (1) All power of legislation regarding the subject matter contained in the statute is conferred upon Congress and withheld from the states, and (2) the statute is obnoxious to the inherent right of free speech respecting the concerns, activities and interests of the United States of America and its government.

The court sustained the judgment of the state court, holding that, although the exclusive right to wage war, etc., is vested in the United States, the State of Minnesota has such an interest in the successful conduct of war that it may pass such a statute as the one here in question. The passage of such legislation is indeed supportable as a simple exertion of the police power, since speeches of the nature of Gilbert's tend to provoke violence at a public meeting.

The case is, of course, the *Abram's* case with a new dressing. Accordingly, Mr. Justice Holmes concurs in the result only, and Mr. Justice Brandeis delivers a dissenting opinion, in which he supports the right of free speech generally, and discussions as to conduct of government particularly. Chief Justice White concurs with that part of the dissenting opinion which contends that the subject matter of the case is within the exclusive legislative power of Congress, when exerted, and that the power of Congress had occupied the whole field in that respect.

CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT.—In *Thornton v. Duff* et al., 41 Sup. Ct. Rep. 136, the subject of controversy is the effect of the workmen's compensation law of Ohio. The State of Ohio, pursuant to a constitutional provision, enacted a law providing that from January 1, 1914, every employer should pay into the state insurance fund a certain fixed amount for claims by employees. This act, however, gave an election to certain employers to deal individually with employees out of benefit funds, etc. The plaintiff, an employer coming within the terms of the compensation act, relied on this latter provision and entered into a contract of insurance with the Aetna Insurance Co. to protect him from loss occasioned by injury to his employees.

In 1917, the legislature enacted a law denying to the employers who indemnified themselves against loss, the power to deal directly with their employees and confined them to the state insurance funds. The plaintiff in the principal case attacks this law on the constitutional ground that it impairs the contract entered into with the insurance company, and takes away property rights which he

had obtained by the alternative provision in the act passed January, 1914. The Supreme Court of Ohio having decided against the plaintiff, he sued out a writ of error in the United States Supreme Court.

This court held that the state court decision was correct, and that the federal court was bound by the decision of the state court as to the constitutionality of the act under the Ohio constitution. The question of public policy which is herein involved, namely, whether it is a valid procedure to prevent individual insurance to protect against loss from injury to employees, is not discussed. The affirmative side of this question is, of course, that such provision would tend to make employers more careful in providing for their employees both as to working materials and as to hours.

Chief Justice White delivered a special concurring opinion in which he stated that if the case had been one of first impression he would have felt bound to hold in favor of the plaintiff employer, but that he was controlled by a prior decision of the Supreme Court which was an authority on the point in question.

CONSTITUTIONAL LAW—VOLSTEAD ACT—CONSTRUCTION OF—SEARCH WARRANTS.—In three federal cases recently decided (*United States v. Rykowski*, *United States v. Kozman*, *United States v. Kedozius*, 267 Fed. 866) the sufficiency of search warrants issued by over-zealous federal commissioners on affidavits made on information and belief was passed upon. In all three cases the affiant stated he "had reason to believe and does believe that a fraud upon the revenue of the United States is being committed, etc." *Held*: Affidavits made on information and belief are insufficient and warrants issued thereon illegal.

The court, however, on motion by defendants to recover their property seized under the search warrants, refused to order the return, holding (1) that the officers had no authority to make the search and illegally seized the property of defendants, and (2) that the property (consisting of stills, raisin-mash and liquors) once having been seized, even though illegally, will not be returned, since "The stills or parts thereof are instruments which have been used and may be used again if returned in violation of the law."

BANKRUPTCY—WHAT COSTS ARE PROVABLE UNDER § 63, ACT OF 1898.—The First National Bank of Livonia held a bankrupt's note for a debt. The note provided for payment of debt with interest "and all costs of collection, including ten per cent as attorney's fees." The bank, as provided by the Georgia Code (§ 4252) gave ten days' notice of intention to sue and collect the note and commenced suit in the forenoon of Sept. 4th. Late on the same day the maker of note filed a voluntary petition in bankruptcy. Thereafter the bank sought to prove as a secured claim the note for principal, interest, attorney's fees and court costs incurred in the suit. It was contended that the attorney's fees and costs were not provable under the provisions of the Act. *Held*: Attorney's fees and

such costs as were incurred prior to the filing of petition in bankruptcy were provable "debts" within § 63 (3) (5): *In re Ledbetler* (N. D. Ga. E. D.—Aug. 12, 1920—267 Fed. 893).

The contention was made that fractions of a day could not be considered in law and that the petition must be considered as having been filed the first moment of the day, and that therefore attorney's fees and costs could not be proved. The court admitted this to be the general rule, but decided that this case fell within the one settled exception, viz., "when necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day," settled by a long line of unanimous authority in federal courts, and applicable to the national Bankruptcy Act. They decided therefore that the words "before the filing of the petitions" in § 63 (3) of the act mean the very instant of filing of the petitions, if ascertainable.

DEEDS—INCIDENTS OF DELIVERY AND RECORDING.—James C. Mitchell made a deed of property to Naomi Clem, whom he afterward married. The agreement surrounding the transaction was that she was to keep the deed as security for his promise to marry her as soon as she could contract a valid marriage (upon the expiration of the statutory period following her divorce). She agreed to keep the deed in her custody, but not to treat it as a conveyance of the property until, and unless, he did not fulfill his promise to marry. During the intervening period the deed was surreptitiously taken from her by a third party and recorded; it having been her express intention not to treat the deed as, in any respect, a conveyance. The marriage took place, she died, and he then filed this bill against her heirs-at-law praying for the removal of the deed as a cloud upon his title. The lower court having refused to remove the cloud on the title and having decreed that the appellees become owners of the premises in fee, he appealed to the Supreme Court.

A divided court (in *Mitchell v. Clem*, 295 Ill. 150, 128 N. E. 815) reversed the decree and remanded the cause with directions to remove the deed as a cloud upon Mitchell's title. The case turned upon the question as to whether or not the deed was ever delivered to the grantee, the majority of the court holding that there was no delivery and the minority holding contra. Having decided a preliminary point in pleading, and also decided that the agreement to marry was legal and not rendered illegal by a void marriage in another state prior to the legal marriage, the court determined the nature and incidents of delivery and the effect of the recording of the deed.

The court predicated its ruling on the principle that a deed takes effect only from the time it is delivered and that a delivery is invalid unless at the time it clearly appeared that it was the present intention of the parties that the deed should pass title. The presumption that possession of the deed by the grantee indicates delivery was declared not conclusive and rebuttable by proof of a different intention. Admitting that the grantee cannot hold the

deed in escrow, the court held that that was not conclusive that the deed was to operate as a present conveyance. Admitting also that parol evidence is not competent to alter or control the effect of a conveyance by deed, it was held that parol evidence was competent to show that there had been no delivery of the deed. The parol evidence was interpreted to indicate that the acceptance by the grantee, which is essential to a delivery, never took place; and that to find otherwise would be to force the title to real estate by conveyance on a person without her consent and against her will. The act of recording the instrument by a third person against the will of the parties was considered as immaterial.

The dissenting opinion, starting from the admitted fact that the deed on its face was absolute, assumed that there was a delivery and declared that the manual transfer of the possession of the deed to the grantee was sufficient to vest title and could not be affected by any extraneous agreements. Declaring acceptance of the deed by the grantee to be unquestionable, parol evidence of the surrounding transaction was declared incompetent to change the result. A citation of authority in the majority opinion was attacked on the ground that this was not a case where the grantee was invested as an agent with the custody of the deed; and the dissenting judges refused to see any alternative to a delivery in escrow to the grantee, which is admittedly impossible. The dissenting opinion concurred with the majority opinion in considering the recording of the instrument to be immaterial.

EXCISE TAX LAW—DEFINITION OF INCOME—TAX LAW AS APPLIED TO SURPLUS OF A MUTUAL LIFE INSURANCE COMPANY.—The case of *Fink v. Northwestern Life Ins. Co.*, 267 Fed. 968, was the result of a situation arising under the Excise Tax Law, but has a present importance in so far as it defines the meaning of the word income as used in statutes. The suit was brought by the insurance company to recover taxes paid to the government and the following questions were raised by the plaintiff:

1. Are dividends of a mutual company, applied at the option of the policy holders to purchase paid up additions, and annuities, or in partial payment of renewal premiums, income within the meaning of the Excise Tax Law? The court held that they were not income for the year in which so applied, having been once taxed as part of the income of the year when received. Such a mutual insurance company collects level premiums large enough to pay the insurance cost, and what is left over is surplus, required by law to be distributed among the policy holders. The dividend of such surplus is in no sense a dividend of profits.

2. Are premiums due and deferred, and interest due and accrued, but not actually collected in cash, income within the meaning of the act? The court held they were not, since the language of the act looks to the time of realization rather than to the period of accrument.

3. Are increases in the value of assets because of accrual of

discounts income, and are decreases in value of assets because of amortization of premiums on bonds a deduction from income under this act? The court answered both questions in the negative.

The discussion by the court as to what was meant by "depreciation of property" is peculiarly pertinent today in view of the cases now pending in the Supreme Court in which an attempt is being made to distinguish income from appreciation of capital. It would perhaps not be too much to say that if the present income tax law and the Excise Tax Law of 1909 are to be construed in the same manner, that the principal case is, by analogy, an authority for upholding a contention for such a distinction.

LARCENY—EMBEZZLEMENT—INTERPRETATION OF DISTRICT OF COLUMBIA PENAL CODE.—The defendant in the case of *Chanock v. United States*, 267 Fed. 612, was indicted for larceny. He had been employed as a bookkeeper and clerk in a hotel, a guest of which hotel gave him two envelopes, containing securities and money, to be placed in the hotel safe. During the night the defendant opened the safe, took the securities, and absconded. When arrested, the property was found in his possession.

He appealed from a judgment convicting him of larceny on the ground that he was an innkeeper, inasmuch as Section 837 of the District Code provided that any innkeeper who converted any of a guest's property to his own use shall be deemed guilty of *embezzlement*. The court held that the defendant was not an innkeeper within the meaning of the Code, but was a mere employee of the hotel owner; and also decided that the bare custody with which the defendant was vested did not change the possession of the property, which constructively remained in the owner. The judgment was accordingly affirmed.

The action of the court in sustaining the conviction is certainly commendable, but it seems as though the argument that the owner retained constructive possession is, to say the least, debatable. By depositing the securities in the hotel safe, the owner certainly lost possession to the hotel. In event of loss, would not the hotel owner stand as special bailee of the chattels? It is submitted that he would. Hence the taking by the employee undoubtedly was larceny, but the larceny was from the hotel owner who had possession, and not from the true owner. The conviction, therefore, was well sustained, but the decision was based upon a fallacy.

TAXATION—INCREASE IN VALUE OF CAPITAL ASSETS NOT INCOME EVEN THOUGH REALIZED BY SALE.—One Brewster was taxed by the government on the profit derived from the sale of bonds. He was not in the business of trading securities, and therefore paid the tax under protest and brought the present suit under the theory that the gain derived from these transactions was not "income" within the meaning of the Income Tax Act, but was an appreciation of capital, and as such not taxable.

His contention was upheld in the District Court of the United

States, District of Connecticut, in the case of *Brewster v. Walsh*, ... Fed. The court made the following points: (1) The Sixteenth Amendment does not extend the taxing power to new subjects (*Evans v. Gore*, 253 U. S. 245), and so the question is as to the meaning of the word "income" as used in that amendment. (2) Cases under the Corporation Tax Act of 1909 have no bearing on this question, as that act was in no sense an income tax law. (3) The meaning of the word "income" in the Sixteenth Amendment is no broader than the meaning given it under the Tax Act of 1867, and the case of *Gray v. Darlington*, 15 Wall. 63, decided the exact point here involved with reference to "income" as used in that act. (4) Increase in the value of capital assets, even though realized, is not income. It is simply capital in a new form.

It is perhaps not worth while here to do more than note the decision. The government has appealed, and this case, together with three more involving the precise point, have just been argued before the Supreme Court of the United States, and a final decision may be expected within a few months. It would be superfluous to point out the resulting effect both on the treasury of the United States (in view of the liability to refund) and on the conditions of commerce in the country generally of a decision exempting from taxation profits derived from conversion of capital assets, such as realty or mercantile specialties, i. e., stocks, bonds, etc.

The theoretical arguments concerning the situation will be elaborated in this LAW REVIEW following the decision by the Supreme Court.

TRADE-NAMES—MONOPOLY IN RIGHT TO COLORING AND FLAVORING MATTER—WHAT IS A DESCRIPTIVE NAME.—For twenty years the plaintiff corporation in *Lilly & Co. v. Warner & Co.* (268 Federal Reporter 156) manufactured and sold a drug known to the pharmaceutical trade and to the public as "Coco-Quinine." This preparation, containing as its therapeutic agent quinine, is sweetened with yerba santa, with chocolate syrup added as a coloring and flavoring medium. The formula is not patented and the preparation is not the subject of a registered trade-mark. Several years after the plaintiff put the drug on the market, the defendant's predecessor put "Quin-Coco" on the market. The latter preparation consists of quinine with yerb santa, vanillin, saccharin, and cocoa, with a syrup base. It is now claimed that this is unfair competition; and the use of chocolate as a coloring and flavoring matter is held to be objectionable as a competing distinctive coloring.

The district court (E. D. Pennsylvania) dismissed the bill in equity, holding: (1) that the preparation, not being patented nor its name trade-marked, may be used and manufactured by any one who in good faith acquires knowledge of its composition; (2) the use of cocoa as a flavor cannot be exclusively claimed, even though it is used as distinctive coloring matter; (3) the name "Coco-Quinine" cannot be an exclusive trade-mark as it is a name merely descriptive of a liquid preparation of quinine to which cocoa has been added.

DIVERSITIES DE LA LEY

CONSTITUTIONALITY OF RENT-REGULATION LAW.—In the January number of this REVIEW appeared a suggestion by the undersigned that the proper and only approach to a constitutional law regulating house rents was by way of a legislative exercise of the police power, declaring the business of housing to be impressed with a public interest. This suggestion was offered because in recent discussion one writer has gone so far as to assert that "the police power has nothing to do with the rent question."

A few days after the publication of the January number of the REVIEW appeared the Jan. 10 issue of the *New York Supplement* of the National Reporter System, giving publicity to the opinion of Finch, J., at a Special Term of the New York Supreme Court, dated Oct. 20, 1920; and corroborating precisely the suggestion made in this REVIEW, by holding the New York law constitutional on the ground mentioned.

The corroboration is so apt that the opinion of Mr. Justice Finch is here set forth in full. His authority as a legal thinker is unquestioned:

Action by Jacob L. Gutttag against Hyman Shatzkin. On demurrer to complaint. Demurrer sustained.

FINCH, J. The complaint alleges that the plaintiff is the owner of real property, and that the defendant was a tenant of an apartment therein under a lease expiring on October 1, 1920, and refused to vacate. The defendant has interposed a demurrer, and the only question raised and argued by counsel is the constitutionality of the law passed by the recent special session of the legislature, prohibiting the recovery by the owner thereof of real property used for dwelling purposes, except in certain specified instances (not alleged in the case at bar), provided a reasonable rental value has been paid.

Protection of homes and housing is certainly within the police powers of the state, provided a public emergency exists which threatens the same. In enacting the statute in question the legislature has declared in express terms that such a public emergency exists, and it is within its province to so determine: *Matter of application of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *McLean v. Arkansas*, 211 U. S. 539, at page 547, 29 Sup. Ct. 206; *Viemeister v. White*, 179 N. Y. 235, 241, 72 N. E. 97. It remains for the court to consider whether the means adopted by the legislature are reasonably adapted to the end sought: *Matter of Jacobs*, supra; *Lawton v. Steele*, 152 U. S. 133, at page 136, 137, 14 Sup. Ct. 499.

Until the expiration of a two-year period the legislature has prohibited the ousting of a tenant from his dwelling, except in certain prescribed instances, provided the tenant is not objectionable, and pays the reasonable rental value of the premises, which reasonable rental value may be determined by the court: Chapter 944, Laws of 1920. It would appear that the means which the legislature has adopted are appropriate to the end sought. The court may take judicial notice of the cause for the existing emergency, namely, a world war during which new building was halted for several years, while a large portion of the entire popula-

tion was taken from its accustomed tasks and turned to war work. The disorganization which has resulted from a return to a peace from a war basis has delayed transportation of material and fuel. This condition, coupled with the scarcity of labor and materials to replace the prior accumulations exhausted by the years of war, has as yet apparently prevented even catching up with the normal building needs, arising since the war and due to normal growth of population. These conditions to be coped with are accentuated in a densely populated center.

It is no answer to say that no action precisely similar to the case at bar has been taken heretofore. It overlooks a fundamental attribute of the principle known as the "police power" which takes into consideration the economic and social conditions of the times. A reasonable allowance must be made for the exercise of legislative judgment, and if the matter is within the legislative discretion the court will not substitute its judgment for that of the legislature: *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206; *Kuensli v. Stone*, 112 Misc. Rep. 125, 182 N. Y. Supp. 680.

It follows that the demurrer should be sustained.

J. H. W.

THE GOVERNMENT POLICEMAN INDICTED—THE PROSECUTOR ASKS FOR CAPITAL PUNISHMENT.—"But, my fellow lawyers, shall there come an end to this Government Policeman? Will he finally be convicted and executed upon the scaffold of justice? The law of average, the sanity of an outraged public, the cry for an honest deal, and back to the Constitution and the law, to the normal in administrative affairs, must and will prevail. The people of a community may become quiescent and suffer, while the wild-eyed reformer, diseased from an overdose of egotism, plies his trade, and the Government Policeman swings his department club, and like Odoacer of old, sits down on the throne of justice, and pollutes the sanctuaries of jurisprudence, but the great common sense of a people will pierce the bubble, and inject into the veins of this reformer the liquid of reason and into the Government Policeman the sauce that soothes, and make them as docile as a lamb." [From an address by James H. Harkless of the Kansas City (Mo.) bar at the 1920 meeting of Oklahoma State Bar Association.—H. H.]

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BOOKS AND PERIODICALS

SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482. Edited for the Selden Society by I. S. Leadam and J. F. Baldwin. Cambridge: The Harvard University Press, 1918. Pp. cxvii, ff. 156, with two Appendices and an Index of Subjects and an Index of Persons and Places.

The Selden Society, which takes its name from a particularly hard-headed legal antiquary, has long been engaged in publishing yearly volumes of great value to the history of law and legal institutions. This book is especially notable, because it is published in this country. The editor for the Selden Society having died, Mr. Baldwin, who had written a book on the King's Council, took up the work, which he completed under great practical difficulties. The result is altogether gratifying. While it cannot be said that any new light has been furnished, the book confirms the hitherto existing impressions of legal scholars.

The work is divided into two general divisions, an Introduction in two parts, the first consisting of matter historical and descriptive of the King's Council as a court, the second being comment upon the cases. The other division gives the original text of the cases with translations of the records that are not in English. The cases extend from 1243 in the reign of Henry III to 1482 in the reign of the first Yorkist king, Edward IV, a period which witnessed great changes in England, and its civilization. During this period the medieval condition was supplanted by the beginning of the modern world and the English language became intelligible to us today.

The first case is dated before Bracton became a judge, when he was probably a court clerk, and before he began writing his great book on the laws. The period witnessed the war of the feudal barons on Henry III, the great legal reforms under Edward I and his successors, the transformation of the whole English industrial system, the abolition of serfdom, the triumph of the barons over Richard II, the premature flowering of parliament and of a constitutional system under the Lancastrians, the destruction of the baronage in the Wars of the Roses and finally the new despotism of the Yorkist kings. In the law itself, the common law, originally with over four hundred actions, became stereotyped into a system with its few actions for the recovery of money damages and specific real and personal property, while the equitable jurisdiction of the chancellor became what it has since remained.

It is plain that such a period will present wide differences. Much tact must be shown in the selection of cases. It is probable that the cases in this book begin with Henry III, because it was during the earlier years of his reign that the King's Council became differentiated as an institution of importance. King John, after being forced to grant the Great Charter in 1215, died in the following year, and his eldest son, Henry III, was but nine years old.

The minority of the ruler brought the King's Council into a prominence which it retained. There are certain records before the Council in Bracton's Note Book which would fall in the period of this minority, and would have been illustrative, but no reference seems to be made to those cases. There is also not noticed one case before the King's Council, involving the detinue of charters of a minor tenant in chief of the King, which is found in the book upon early English Equity of Mr. Barbour ("Multis ille bonis flebilis occidit"). This case is not noted.

The cases are well chosen to illustrate certain matters, such as the rights of aliens, the control over the depredations committed on the sea by the admiral or by English subjects, the mob treatment applied to foreign merchants, and special cases of importance which the ordinary courts could not handle.

The general features of the gradual differentiation of the King's Council from other bodies and its transformation into the Privy Council with the Judicial Committee of the Privy Council, as the highest court of appeal in colonial appeals are fairly well settled. Even today the judgment upon such appeals takes the form of advice to the king.

Herbert Spencer in one of his lighter moments threw out the suggestion that evolution is a "progression from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity." Translated into plain words he is merely stating that evolution proceeds by division of labor. He believed that the formula could be applied both to living organisms and to social institutions. However debatable his statement may be as a general truth applicable to legal institutions, it is fairly applicable to the subject of this book, except that the evolved "heterogeneity" is no more coherent than the original "homogeneity."

The "indefinite, incoherent homogeneity" begins with the Conqueror and the 'commune concilium' of his tenants in chief. It was the feudal court of the lord of the fee convoking his tenants. The Anglo-Saxon myth-makers would place this institution before the advent of the Normans, but without any historical warrant. The functions of this council were legislative, executive and judicial and it was in truth an "incoherent homogeneity." But heavy-handed Norman barons were not happy instruments either for administrative or judicial work. Naturally a body with some training and precedents was needed and the curia regis, an offshoot of the great council, soon became that body, while the great council was convoked mainly for legislative purposes. But the collection of dues and taxes, the most vital function of administration, produced a special body with mixed administrative and judicial duties, called the exchequer, a special department of the curia regis.

Soon it was found that regular judicial officers were needed and there came an offshoot from the curia regis of a fixed body of judges of the King's Court, while the exchequer retained both its administrative and judicial functions. Magna Charta broke into the system by requiring the court for ordinary cases between subject and subject to be held at one place, and the King's Court was

divided into the common bench at Westminster and the king's bench (*coram rege*), which followed the king. Thus three courts after Magna Charta were in existence, namely, the King's Bench, the Common Pleas and the Exchequer.

The *curia regis* remained, generally presided over by the chancellor. While the regular courts took jurisdiction of ordinary cases, they were more or less bound by precedents and cases of particular difficulty remained for the *curia regis*. The minority of Henry III emphasized the executive and administrative functions of the *curia regis* as the King's Council, while the great council re-enforced by burgesses and knights of the shire began the process by which the great council as the Parliament, in course of time absorbed the legislative function, with the House of Lords as the ultimate court of appeal in all the cases within the realm. No one can say that this 'heterogeneity' is coherent or that there is anything definite about the jurisdictions.

The rest of the story of how the chancellor's court grew out of the judicial functions of the King's Council, how the chancery jurisdiction was gradually developed; how the King's Council became the Court of Star Chamber by statute; how an executive body of royal advisers out of the council, not at first taken from Parliament, became the cabinet; how the legislative body appropriated the executive cabinet function as that of a committee of its own; how at last the King's Council became the Privy Council with its Judicial Committee, brings the original, "indefinite, incoherent homogeneity" down to its present "heterogeneity," but that the "heterogeneity" is either definite or coherent can be affirmed only by a philosopher who is not impeded in his generalizations by a definite and coherent knowledge of law. It is a part of this long story that the book under review illustrates. I will try to indicate one or two of the many matters of interest for a reader of this book.

The work upon the texts is generally but not always accurate. A gross error of the copyist of a record in omitting a name in the first case is not corrected and a patent error in translation is made. One would wish that the comment upon the cases were less heavy and betrayed more liveliness and human interest. One must look through the dry words of this first record (Case No. 1). It shows a situation as pathetic as that of a rich brewer's daughter from this country, married to some baron serving in the German army during our late war. The year of the case is 1243. The English King Henry III is not only King of England, but, as Duke of Normandy in France, he is a subject of the French King and the subject is now at war with his sovereign. A landowner named Boistard, with lands in both England and Normandy, had died, leaving three sons, who were John, Roger and Walter, in the order of birth. John stayed in England to do homage and to hold the English lands. The two younger sons departed for Normandy and held the French lands, but unfortunately the elder brother died. Roger, the second son has done his fealty in Normandy and if he comes back to England, he will be seized as an enemy, yet only the heir (and by right of primogeniture the elder, Roger, is the sole heir) can claim or take the English lands.

The two brothers consult a Norman lawyer. Bracton's book is not yet out. Glanville gives no light. Bracton a few years later says that Roger should give a power of attorney to take possession. But that advice applies only to a time of peace. War is now on. So the lawyer, with the legal talent for indirection, advises a course of deception. Walter, the younger son, who is not embarrassed by any French fealty, shall go back to England, give out that Roger is dead, and enter upon the enjoyment of the English lands. Walter does so, arrives in England and takes possession. But Philip de Cumbell is lord of the fee and he, after Walter has been in possession nine days, ejects him because he is not the heir. Walter, not at all daunted, goes to London and sues out a writ of novel disseizin which calls upon Philip to say whether Philip has unjustly and without judgment disseized Walter. This writ would ordinarily go to the assizes to be heard, but here it is heard by the King's Council sitting as a *nisi prius* court.

A jury is called. The writ is read. Philip answers and pleads an exception to the writ, that Roger is elder son and that Walter came from transmarine parts and intruded upon the lands. Walter simply replies that he was in peaceable seisin, not answering the exception. Some English lawyer had advised him that novel disseizin tried the seisin, not the title. So it did theoretically, but not practically. The jurata (jury) says that the eldest brother, John, died without issue, that Roger is the next son, that he was in Normandy and not in fealty to the English King, that as soon as John died Philip de Cumbwell as chief lord took seisin, saving the right of the heir, that then Walter came and took seisin and held it for nine days and then Philip ejected him, that they do not know whether Roger is alive or dead; and the wise jury, with the fear of an attainr before its eyes for a false verdict, refuses to find on the disseisin and "passes the buck" by asking the judgment of the court whether it was seisin by Walter and disseisin by Philip. The court, in the best judicial manner, dodges the question and upon proof that Roger is in France and does homage there, decides that the land shall be held in the King's hands until the King determines otherwise. It seems to be the law that an alien enemy cannot enjoy his lands in England. This seems to have a very modern tone.

The real question, of course, was not decided, whether against a peaceable seisin the disseisor could prevail not by showing a better right, but by showing that the possessor had no title. So the neat scheme of an alien enemy to be worked out by means of a convenient younger brother was remorselessly butchered. Our Alien Property Custodian would no doubt say that it was very proper action. But have we any right to look back pityingly upon our poor medieval predecessors?

Passing on for seventy years we reach a genuine romance in high life (Case No. 6 in 1316), one of those human triangle plots, so beloved of the novelist. Edward I, the English Justinian, has not long been dead. Edward II now reigns in his stead. The King's consort is that Isabella, called "the she-wolf of France," who was a daughter of the crafty Philip the Fair. She and her

paramour, Roger Mortimer, have not yet brought Edward II to his death. One of the leading nobles of England, of the blood of the royal house of Plantagenet, is a young man, John, Earl Warenne and Earl of Surrey, a title that in the female line is still enjoyed by the Duke of Norfolk. When twenty years old, much as the great general, the Prince of Condé was married at a similar age to Richelieu's niece, and cordially hated her ever afterwards, this young nobleman had been married to Joan of Bar, daughter of the Duke of Bar, who married the English King's sister. Joan was wholly innocent in the matter, for she was but thirteen at the date of the marriage. The Earl Warenne as time went on hated her no less cordially than the great Condé hated his bride. But Maud or Matilda of Nerford, of an excellent family, probably a near neighbor of the Earl in Norfolk, had his whole devotion. They loved not wisely, but too well. The Earl was on such bad terms with his wife that three years before this she was protected by a royal body guard. After ten years of marriage the Earl began to cast around for some means of getting rid of Edward I's granddaughter.

The scheme devised, no doubt by legal advice, was to allege that the Earl, prior to his marriage to the Princess of Bar, had plighted his troth to Maud. If that were so, the ecclesiastical courts, which had sole jurisdiction of matrimonial causes, would hold that the marriage to Joan was absolutely void, since the precontract with Maud, followed by cohabitation and consummation, invalidated the later marriage. In the canon law *'verba de futuro'* with cohabitation constituted a valid marriage. This was the holding in the famous case of Richard de Anesty in the time of Henry II and was the undoubted canon law. So out in Norfolk in the ecclesiastical court of a creature of Earl Warenne, Maud brought an action against Joan of Bar, Countess of Warenne, and her husband, John, Earl Warenne, to establish the precontract and to annul the marriage. The Archdeacon, presiding over the court, issued a citation and caused it to be served by the chaplain of Yaxley.

The clodpated chaplain proceeded to London. In some way he wormed his way into the royal palace at Westminster and found Lady Joan of Bar with Queen Isabella in the chapel and had the effrontery to read to her the citation to appear before the court of an obscure Archdeacon in a parish church in Norfolk to answer to the charge that she was not the legal wife of the Earl. One can with difficulty imagine Queen Isabella's wrath and disgust at hearing this ragged parish priest summoning her niece on such a citation. The archdeacon was at once dragged before the King's Council for contempt of many things royal, and was thereupon committed to the Tower.

As a matter of fact the divorce was never granted, but a separate maintenance of 740 marks per year was awarded to the princess, which at the present value of money would be, perhaps \$50,000. We may give the Earl the benefit of the doubt and believe that had he been successful, he would have married the mother of his children. He did, however, take steps to settle large estates upon his

two sons by her, but they both died before their father. In the meantime the Earl had gallant adventures with other ladies, but that is another story. His life is good material for a tale as interesting as one of Scott's novels.

Other cases could be noted, especially a very sad recital (the last case, in 1432) of a poor Frenchman at Rouen who, during the English occupancy under Henry V, had bound out his children to an English father and son by an indenture made before the Mayor of Rouen. The peculiar thing is that by the indenture schooling for two years for the two boys was provided for, but the daughter presumably had no need for schooling. The children were taken over to England, made mere drudges, treated shamefully and, of course, given no schooling. When the time came for them to be released from their serfdom, the English father was dead, but his son demanded a large sum of money as a 'solatium' for letting the children go. Thus the father of the children was compelled to appeal to the King's Council. The result of the petition is not shown. Let us hope that justice was done, but we may entertain some doubt, for it was but the year before, in 1431, that Jeanne d'Arc was burned at the stake in Rouen. If her appealing personality could not move those Hunnish hearts, it is not likely that the fate of three helpless children would excite compassion. The fierce indignation of Englishmen at the fate of Edith Cavell may give them some idea of the figure cut by their ancestors in the burning of Joan of Arc.

There are other cases presenting interesting matters, especially the cases on the high seas and another case where citizens of London tell a remarkable tale of the exactions of a Bishop of Bath, but enough has been said to indicate that the average human being differs little today from what he was in times very close to the Dark Ages. The printing of such records as these needs to be supplemented by the numberless early chancery petitions and proceedings, which exist today and which are probably the richest source of unexplored material for the history of England in the later portion of the Middle Ages.

JOHN M. ZANE.

ARTICLES IN PERIODICALS

- LEGALITY OF THE PACIFIC BLOCKADE—*I. Albert H. Washburn. Col. L. Rev. XXI, 55.*
- RESULTS OF THE LABOR CLAUSES OF THE TREATY OF VERSAILLES. *David H. Miller. Cornell L. Q. VI, 133.*
- REORGANIZATION BY DECREE. *Robert Walker. Cornell L. Q. VI, 154.*
- TRUST RECEIPTS. *Winthrop Taylor. Cornell L. Q. VI, 168.*
- TORTS WITHOUT PARTICULAR NAMES. *Jeremiah Smith. Penn. L. Rev. LXIX, 91.*
- CONTINENTAL LEGAL LITERATURE. *John M. Gest. Penn. L. Rev. LXIX, 121.*
- DUTY OF LANDOWNER TO THOSE ENTERING PREMISES OF THEIR OWN RIGHT. *Francis H. Bohlen. Penn. L. Rev. LXIX, 142.*
- TABULAE MINORES JURISPRUDENTIAE. *A. Kocourek. Yale L. Jour. XXX, 215.*
- JURAL RELATIONS AND THEIR CLASSIFICATION. *Arthur L. Corbin. Yale L. Jour. XXX, 226.*
- APPRECIATION IN VALUE AS INVESTED CAPITAL UNDER THE EXCESS PROFITS LAW. *Charles McCamie. Yale L. Jour. XXX, 239.*
- PRIVATE INTERNATIONAL LAW OF THE NETHERLANDS. *J. Offerhaus. Yale L. Jour. XXX, 250.*

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THE FRENCH SYSTEM OF MILITARY LAW¹

BY ERNEST ANGELL

I

ORIGINS OF THE 'CONSEIL DE GUERRE'²

The development of military justice in France has been a matter of legislative action, supplemented by administrative decrees. It is not surprising to find that a continental organization of military justice should be one of statutory origin and growth; it is in harmony with the genius of the civil law. It would, however, be inaccurate to overlook the influence which texts and comments, ministerial circulars, army orders and the like have had. The liberalizing of the spirit of administration of the 'conseils de guerre' in the later period of the recent war was due as much to the restraint of the French government, to the ministry of war, and, in particular, to Marshal Pétain as to specific enactments of the legislature.

The early 'ordonnances' of the États-Généraux were aimed to protect the civilian population from military abuses and exactions. The Revolution swept away the existing structure of a number of tribunals with conflicting jurisdiction by substituting a system of courts-martial with 'grand' and 'petit jury'—'jury d'accusation' and 'jury de jugement.' Jurisdiction of civil and military courts was made to depend solely on the nature of the offense charged, military crimes even of civilians being tried exclusively in the military courts, civil crimes even of the military exclusively in the civil

1. The writer acknowledges his great indebtedness to Maître Bruhnes, of the Cour D'Appel, Dijon, for much assistance in material and in the correction of this article in an earlier form.

2. See generally for the history of French military law: *Fusier-Herman*, "Répertoire général alphabétique du Droit français," Vol. XXV tit. "Justice militaire," pp. 747 et seq.; *Foucher*, "Commentaire sur le Code de Justice militaire": Introduction.

courts. By the laws of 1796-97 the 'conseils de guerre,' substantially as they exist today, were created one for each army, with a 'conseil de révision.' Napoleon's decree of 1806 finally suppressed juries entirely as subversive of military discipline. Thus the organization of civil and military justice on equal footing, inaugurated by the Revolution, failed to persist.

In the years following the revolutionary period numerous efforts were made to adapt the 'conseil de guerre' to the newer conditions of a more stable national life. Legislative commissions were appointed not less than seven times between 1814 and 1829, some modifications of no great importance were introduced by legislation and by decrees, but it was not until 1857³ that a comprehensive code was adopted, upon the monumental study of Foucher and Marshal Vaillant. The code of 1857, based upon the draft prepared by the commission of 1829 and drawing much of its material from the structure set up by the revolutionary laws, created the present organization of the 'conseil de guerre' and 'conseil de révision,' defined their jurisdiction and regulated their procedure substantially as they exist today. From that time to the recent war only minor changes were made. The struggle which closed in 1918, however, introduced modifications of great importance, the nature of which was shaped by the character of the war.

II

ORGANIZATION AND JURISDICTION

France is divided⁴ into twenty-one 'regions de corps d'armée.' A permanent 'conseil de guerre' sits in continuous session at the seat of each 'région.' The jurisdiction of this court extends to all offenses committed in the 'région' within the cognizance of a *conseil* and to all persons subject to military law found within the 'région.' The judges are seven officers, the president being at least a lieutenant-colonel, the rank of all the judges depending on the rule that no member of the court shall be of rank inferior to that of the accused. The general commanding the 'région' appoints the judges for a term of six months in rotation from among the officers on duty in the 'région.' Near relatives of the accused may not sit upon the court and the judges may be challenged by the accused for cause as provided by the code. The 'juge d'instruction,' known as the 'rap-

3. Loi du 9 juin, 1857.

4. Reference to the separate sections of the code of 1857 is not deemed necessary.

porteur,' who investigates the case and prepares it for trial, and the 'commissaire du gouvernement,' who assumes the active prosecution at the trial, are also officers holding permanent tenure and appointed by the minister of war. The 'greffier,' also of permanent tenure, is the clerk of the court. These three with their substitutes form the 'parquet.'

Any number of 'conseils de guerre aux armées,' as distinguished from the 'conseils des régions,' may be created in time of peace by law or by ministerial decree,⁵ and in time of war by order of the general commanding a larger army unit. Ordinarily they exist and function only in time of war, and are then appointed for any separate army unit, generally not less than a division, or for territory declared in a state of siege. The jurisdiction of this court is not territorial. A president and four other judges compose the court. The functions of 'rapporteur and 'commissaire du gouvernement' are combined in one officer.

The 'conseil de guerre' is the normal tribunal for all offenses committed by the 'militaires,' including offenses of a non-military nature made punishable by the penal code applicable to the civilian population. Jurisdiction thus depends primarily upon the status of the accused rather than upon the nature of the offense. Certain minor offenses against the fish and game, customs, and forest laws are exempted from the normal jurisdiction of the 'conseils.' The military remain theoretically subject to the jurisdiction of the civil courts for all offenses punishable under the Code Pénal, but in practice officers and soldiers are generally tried before the military courts.

The armed forces subject to the jurisdiction of the 'conseils' include of course all officers and soldiers on active service, all persons 'assimilated' to those forces during the term of their active service while carried on the rolls ('articles') or on detached duty,⁶ students at the military schools, prisoners of war, the reserve and territorial forces while mobilized or summoned for maneuvers. A 'militaire' on leave is not subject to these courts except for a few offenses. A deserter, one who has been stricken from the 'articles,' is henceforth regarded as a civilian except as to the original offense of desertion. In time of peace civilians are not within the jurisdiction of the 'conseil de la région.'

5. Loi du 3 avril, 1878.

6. An individual mobilized but serving on detached duty with a private company and there engaged in work for the national defense is within the jurisdiction of a 'conseil de guerre': Conseil de Révision de Paris, May 1, 1917.

The jurisdiction of the 'conseils aux armées' is much broader and extends to all persons subject to the territorial 'conseils'; to civilians attached to the particular unit for which the 'conseil' is created; to persons who follow the army; if on foreign territory, to any person, civil or military, French or foreign; and if on French territory, to any foreigner charged with any offense in the military code or to any French national charged with certain specified offenses of a peculiarly military and serious nature. The law of 1916⁷ enlarged this jurisdiction by providing that within territory declared to be in a state of siege, in case of imminent peril resulting from foreign war, as distinguished from internal insurrection, any person irrespective of status may be tried before the proper 'conseil' for certain offenses under the penal code which had hitherto been solely within the cognizance of the civil tribunals.⁸ The jurisdiction of the civil courts, however, continues in such cases unless and until the 'conseil' assumes jurisdiction. The French government recognized that this enlarged jurisdiction of the military courts should be regarded as exceptional, and by ministerial circular enjoined a strict interpretation in favor of civilians, upon the fundamental principle that "persons not of the military forces are recognizable primarily of the courts of the civil law."⁹

Where the accusation lies against several persons jointly, of whom some are and some are not within the jurisdiction of the 'conseils,' all the accused are tried in the civil courts, unless they are

7. Loi du 27 avril, 1916, art. 6.

8. Senator Flandrin, who drafted the act, explained that its purpose was to extend the military jurisdiction to "crimes et délits . . . d'une gravité si intimement liée aux intérêts de la défense nationale qu'il est impossible de refuser aux juridictions militaires compétence pour en connaître. . . . C'est ainsi que, normalement, le meurtre rentre dans la compétence des tribunaux de droit commun; mais, si le meurtre a été commis pour pénétrer les secrets de la défense nationale, pour s'introduire dans un établissement militaire, pour avoir le moyen d'y commettre ou d'y tenter un acte de sabotage, le meurtre doit pouvoir être déféré aux juridictions militaires": Dalloz, *Recueil périodique de Jurisprudence*, 1916 IV pp. 231-2.

This enlarged jurisdiction over civilians may serve to bring civilians to trial before a regional 'conseil.' The writer was called to testify as a witness at the trial before the Conseil de Guerre of the 8th Région in February, 1919, of three civilians, of whom two were foreigners, for intelligence with the enemy. The Conseil ruled, upon an objection to its jurisdiction, that the prisoners although civilians were within its 'compétence,' under this law of 1916. Upon a second and more interesting objection that as the charge was of an offense against the American Expeditionary Forces, the accused were within the exclusive jurisdiction of the American courts of military justice, the Conseil ruled that it nevertheless had jurisdiction. As the conviction of the prisoners was not appealed, this ruling was not further questioned.

9. Circulars of the Ministère de la Guerre, 18 et 29 avril, 1916.

with the army on foreign soil or at home in the presence of the enemy, or unless they are foreigners.¹⁰

The jurisdiction of the 'conseils' is limited to matters of a penal nature and does not extend to proceedings for the recovery of money or property, except for the execution of a judgment imposing a fine. Actions in rem for the recovery of property are solely within the jurisdiction of the civil courts, except for the limited jurisdiction of the 'tribunaux prévôtants' in enemy country.

III

PROCEDURE BEFORE THE 'CONSEIL DE GUERRE.'¹¹

The proceeding before a 'conseil' is divided into three parts, known as 'enquête préliminaire,' 'instruction,' and 'jugement' The 'enquête préliminaire,' or informal proceeding comprising all steps prior to the formal prosecution, is made by the 'police judiciaire,' that is, the 'rapporteur' or an officer of the 'gendarmerie.' They have power to initiate an 'enquête' but the formal prosecution can not take place nor can the trial be ordered except on order emanating from the general commanding the 'région,' who may also act entirely on his own initiative. In case of a civilian suspected of an offense within the jurisdiction of a 'conseil,' the initiative may proceed from any police official. In either case a formal 'procès-verbal' is prepared with incriminating documents and other exhibits duly attached, and forwarded with the 'plainte' or 'dénonciation' to the commanding general if the person arrested is a 'militaire' or to the 'procureur' if a civilian. In the latter event the papers are transmitted by the 'procureur' to the commanding general if the offense charged is deemed to be within the jurisdiction of the 'conseil.' If the case is

10. Cour de Cassation, April 2, 1909, Article 60 of the code provides that when a person cognizable of a 'conseil de guerre' is charged at the same time with an offense within the jurisdiction of a 'conseil' and of an offense within the jurisdiction of a civil court, he shall first be tried in the proper court for the offense carrying the heavier punishment and then for the other offense; but a prisoner undergoes only the more severe of the two sentences, the military courts having priority where the two offenses carry the same sentence. Cf. as holding sentences of military courts cumulative, *Kirkman v. McLaughrey*, 160 Fed. 436, 90 C. C. A. 86 (1908).

11. For procedure generally, see: Code de Justice militaire pour l'Armée de Terre; *Foucher*, op. cit.; *Fusier-Herman*, op. cit.; *Leclerc de Fourolles et Coupois*, "Le Code de Justice militaire pour l'Armée de Terre," 1892; *Augier et Le Poittevin*, "Traité théorique et pratique du Droit pénal militaire," 1906; *Taillefer*, "La Justice militaire dans l'Armée de Terre," 1895. Arrêt du 15 mars, 1872; Conseil de Révision de Paris, Aug. 13, 1880; same, Dec. 13, 1883; same, March 27, 1884.

decided by the general to be one solely of civilian jurisdiction, he refers the charge to the 'procureur' for proper action.

The second stage in the proceedings, the 'instruction,' begins when the commanding general, acting on the advice of the 'rapporteur,' passes on the question of whether there is probable cause. If an affirmative decision is reached, this being within the province of the general to determine, an 'ordre d'informer'¹² is issued by virtue of which the real prosecution is begun by the 'rapporteur.' Otherwise a 'refus d'informer' frees the accused definitely. Without an 'ordre d'informer' all further prosecution is null and void. The accused may be tried and found guilty only on charges preferred in the 'plainte.'¹³

The 'ordre d'informer' is transmitted by the 'commissaire' to the 'rapporteur' who thereupon proceeds to the preparation of the case for submission and trial. The 'rapporteur,' never the 'commissaire,' interrogates the accused and witnesses, and reports periodically to the 'commissaire,' who may require that further specified inquiries be made. We are speaking of the procedure in 'conseil de guerre de la région' where the rôle of the 'rapporteur' and the 'commissaire' are distinct. The accused must be interrogated by the 'rapporteur' himself and interrogatories signed by the accused. The entire formal 'procès-verbal' of the 'instruction' must be read to the accused, the omission of this step being ground for 'annulation' of any judgment rendered at the trial.¹⁴

Provisional release of the accused ('mise en liberté provisoire') may be obtained. It does not exist as a matter of right but may be accorded by the 'rapporteur,' although the 'commissaire' may enter an objection before the commanding general.¹⁵

The 'instruction' terminated, the 'rapporteur' transmits his formal report to the 'commissaire,' with all documents and exhibits and an opinion as to whether he thinks the case should proceed to trial. The 'rapport' is null and void if it incorporates any 'procès-verbal' not in the prescribed legal form.¹⁶ The 'commissaire' examines and in turn transmits the 'rapport' with communication of his opinion to the commanding general, who usually follows this opinion although he is not bound to do so. The general pronounces either an 'ordre de mise en jugement' (order to proceed to trial)

12. Cf. *Desjardins*, *Révue Critique de Legislation et de Jurisprudence*, 1886 pp. I et seq.

13. Conseil de Révision de Paris, Feb. 18, 1881.

14. Conseil de Révision de Paris, Jan. 15, 1885; same, May 27, 1886.

15. Cf. Loi du 22 décembre, 1917, amending Article 105 of the code.

16. Conseil de Révision de Paris, Oct. 1, 1880.

or an '*ordonnance de non-lieu*' (order to quash the indictment), his decision being subject to review and reversal only by the minister of war. An '*ordonnance de non-lieu*,' although it does not prevent disciplinary action, terminates all further prosecution, including charges modified or redrawn.¹⁷ Any subsequent proceedings must be based on new charges. An '*ordre de mise en jugement*' may be adjudged null and void if it does not specify with precision the charges on which the accused is to be tried; it must be limited to the charges set forth in the '*ordre d'informer*.'¹⁸ An order to proceed to trial followed by an '*instruction*' may result in the accused being remanded to a civil court or to the '*parquet*' of another '*conseil*.'

The accused has the right to select his own counsel, in default of which counsel is named by the '*conseil*.' Where the case is tried before a territorial '*conseil*' at least three days must intervene between the nomination of counsel and the trial, and twenty-four hours where tried before a '*conseil aux armées*.' The right of the accused to select and confer with his counsel would seem to be a necessary protection from the very outset, especially as the '*rapporteur*' formally interrogates the accused and witnesses at the '*instruction*' and as this part of the proceeding shapes the entire course of the trial proper. The instruction is not merely a formality but is the basis of the trial, thus assuming far greater importance than the informal preparation of the case by the prosecutor or the judge-advocate in American law. Under the code of 1857 counsel for the accused had no right to be present and to ask questions at the '*instruction*,' which was secret in this respect. The law of 1899¹⁹ extended the right of counsel to be present and to interrogate at the '*instruction*' (a right existing since 1897 before the civil courts), to cases of military justice, but only in time of peace. The reason for this somewhat curious limitation is largely historical and is to be found in the supposed interests of national defense conceived as a result of the Franco-Prussian war. It will be remembered that that war was lost by rapid campaigns and a few decisive battles. Thus the interest of the state in summary justice and prompt example was considered to outweigh that of the accused in being aided by counsel at the '*instruction*.' This rule was not changed until 1899. The character of the war of 1914-18, however, brought about a natural and desir-

17. Cour de Cassation, July 24, 1874.

18. Conseil de Révision de Paris, April 5, 1881; same, Oct. 1, 1880; same, May 6, 1881; same, June 8, 1882; same, Dec. 13, 1883; same, March 27, 1884.

19. Loi du 15 juin, 1899.

able change in this conception. As the armies settled down into trench warfare and the war dragged on beyond all expected limits, the 'instruction' providing wider guaranties to the accused, regarded as impossible under the exigencies of a short war, was readily recognized as of prime importance. Thus Article 3 of the law of April 27, 1916, rendered applicable the essential principle of the 'instruction contradictoire' to trials before the territorial 'conseils' but not to those in the armies at the front. The law of May 13, 1918, extended by later decrees, although not granting to the accused under trial at the front the right to have his counsel present at the 'instruction,' did accord the right to choose his counsel for the 'jugement' and to communicate with him in advance of trial. Further protection was afforded by the gradual filling of the offices of 'commissaire' and 'rapporteur' with officers who had been lawyers and magistrates in civil life. This development of the protection of the accused was furthered by the public airing of several unsavory military trials which had taken place in the early part of the late war wherein proceedings had been rushed through in violation of substantial justice to the prisoner and a reversal of judgment and sentence was effected by the reviewing authority too late to prevent summary execution of the death sentence. Marshal Pétain's circulars during the latter eighteen months of the war urged continuously greater consideration for the rights of the accused and greater insistence on the duties rather than on the power of authority. These circulars had a similar beneficent effect.

Turning now to the trial itself, the 'rapporteur' has prepared the case for the prosecutor and it is on the basis of this 'rapport' that the trial takes place. The 'rapport' is submitted in advance of trial to the president of the court, who as well as the "commissaire" and counsel for the prisoner is thus presumed to be familiar with it before the trial opens. The interrogatories submitted by the president of the court follow the lines of real importance in the case and as developed at the 'instruction.' The trial therefore assumes an entirely different character from that known to us by reason of the great importance of the 'instruction' and the fact that the president of the court, if not the other judges as well, has almost unavoidably formed an opinion in advance of the probable guilt or innocence of the accused. The sessions are ordinarily open to the public, but they may be ordered held in 'huis clos' and all public reports of the proceedings forbidden. After formal reading of the "ordre de convocation" and the 'rapport,' the prisoner is subjected to an 'interrogatoire' by the president, who alone interrogates both the

accused and the witnesses, either on his own initiative or as asking questions presented orally by the 'commissaire' or by counsel. Before the witnesses are examined any objections to the jurisdiction of the court are offered; they are decided by the court immediately and if overruled the trial proceeds. The validity of these rulings affords the accused ground for 'recours en révision' or 'pourvoi en cassation.'²⁰

Witnesses ordinarily appear and testify in person, but if the witness is not present at the trial his testimony as offered at the 'instruction' may be read by way of deposition and is considered a valid part of the proceedings. By virtue of its discretionary power the 'conseil' may admit testimony from a witness who has not been heard at the 'instruction.'²¹ The president is expected²² to refrain from manifesting his preconceived opinion, if any, in the questions which he puts to the witnesses and to the accused, but to an Anglo-Saxon lawyer the absence of all restrictions on leading questions seems striking both in principle and in practice. As examination and cross-examination by any one other than the president proceeds as in civil trials through questions propounded by the 'commissaire' and by the 'defenseur' and directed by the president to the witnesses who reply direct to him, cross-examination as known in our trials loses half of its value by making it less possible to catch the witness momentarily off his guard by a series of rapid-fire questions designed to break down any inconsistencies in testimony. The absence of anything corresponding to the rules against hearsay and opinion evidence seems greatly to weaken what our law regards as vitally necessary guarantees. Objections to testimony are rarely made, and then not as asserting the right of either side thus to effect the exclusion, but only as pointing out the relative improbability, immateriality or unfairness of the particular bit of testimony offered. No written record is made of the evidence except as it is contained in the formal 'rapport' of the 'instruction' with accompanying exhibits.

The court is not a mere passive and colorless arbiter as in American penal and civil law, but actually directs the proceedings, completely overshadowing both prosecution and defense. Testimony offered at the trial, at least before a regional 'conseil' where the

20. The 'conseil de guerre' may not of its own initiative rule upon its jurisdiction to try the accused or the offense if no objection to jurisdiction has been raised: Cour de Cassation, May 9, 1878.

21. Conseil de Révision de Paris, Oct. 6, 1884.

22. The expression of an opinion is ground for 'annulation': Conseil de Révision de Paris, Dec. 11, 1884.

president has had time to study the 'dossier' in advance of trial, is less exhaustive than at the 'instruction' and serves merely to give the judges an outline of the substance of the testimony offered at the 'instruction' and to familiarize the other members of the 'conseil' with the proof. In proceedings before a 'conseil aux armées' in time of war the trial proper brings out the proof in greater detail, as the presiding colonel has other and arduous duties which ordinarily do not leave him the time necessary to become familiar with the case in advance. This is furthered by the omission of the general rule that the witnesses must have testified at the 'instruction' and in some cases by the omission of any 'instruction.' Wherever it is not omitted, however, it serves to limit the scope of the trial both as to charges and testimony, and with the painstaking 'rapport' it insures both prosecution and defense against surprise at the trial. It insures a far more thorough preparation of the case on both sides than is possible under a haphazard system of interviewing the witnesses in advance if it is known who and where they are, and if they will consent to talk. The regularity of the 'instruction' as the essential basis of the entire proceedings together with its limitation of the scope of the issues may be offset against the shock which an English or American-trained lawyer must necessarily feel on observing for the first time the apparently summary and off-hand character of the trial itself, particularly in the examination of witnesses.

The offering of testimony being completed the accused may then make a statement in his own behalf. There follow the arguments of counsel in which considerable latitude of comment is permitted. The closing statement to the court rests of right with the defense. The court is then cleared and the 'conseil' proceeds to the judgment and sentence if guilty. Two questions must, under pain of nullity of the entire proceedings, be separately decided for each of the offenses charged: first, is the accused guilty of the charge?; second, was the offense committed under extenuating or aggravating circumstances? If the accused has invoked a legal excuse or justification, this becomes a third question: was the offense committed under circumstances rendering the accused excusable in point of law ('excusable d'après la loi')? The voting then results in the formal judgment²³ of guilty, acquittal or 'absolution' if guilty of a charge for

23. The 'jugement' must make mention of all the formalities prescribed, must contain all rulings made upon points of jurisdiction, etc., and must set out: (a) names and rank of the judges; (b) name, age, profession, and domicile of the accused; (c) the charges on which the accused was brought before the court; (d) the swearing of the witnesses; (e) the legal requests

which no punishment is provided by law. The law of 1916 provided that extenuating circumstances might be considered in time of war. Hitherto they could be considered only in time of peace. Another section of this same law extends to time of war the benefit of a stay of sentence ('sursis'), which is lodged normally in the hands of the commanding general of the 'région' or of the division.

The procedure in trials before the 'conseils de guerre aux armées' is substantially the same, with one important exception, as in proceedings before the regional 'conseils.' There may be a formal written 'instruction,' but it is generally oral only and the accused is haled directly and without 'information' before the court. The witnesses need not have been cited to appear. The entire 'instruction' may be omitted. Certain other differences have been previously noted with emphasis on the development of the guarantees to the accused during the recent war.

IV

'RECOURS EN RÉVISION' AND 'POURVOI EN CASSATION'

From a finding of guilty by any 'conseil de guerre' the normal proceeding of appeal, properly one of error only, is the 'recours en révision' addressed to the 'conseil de révision,' instituted within twenty-four hours after the finding of guilty has been communicated to the accused by the 'commissaire.' Under the original Code Militaire of 1857 as modified by the law of 1875²⁴ the 'recours' against a 'jugement' of a 'conseil aux armées' may be temporarily suspended by presidential decree. This was in fact done during the recent war by the decrees of August 10th and 17th, 1914; the decrees of June 8, 1916, restored the 'recours' to those condemned to death, hard labor for life or deportation. These decrees were in turn modified by that of June 8, 1917, suspending the 'recours' where the finding was based on certain serious charges of aiding and abetting the enemy—the occasion here being the serious interior troubles of that period. Finally the decrees of July 13, 1917, and February 26, 1918, restored the 'recours' to those condemned to death, hard labor for life and deportation. These fluctuations follow approximately the same line of development as that of the other guarantees to the

(f) 'réquisitions' made to the court; (f) the questions put at the conclusion of the trial by the president to the members of the court, the decisions thereon, and the voting; (g) the text of the law applied; (h) whether the trial was open to the public; (i) the fact of the public reading of the 'jugement' by the president.

24. Loi du 18 mai, 1875.

accused already discussed in this paper. When 'recours' is suspended no appeal whatever can be taken and the sentence on the findings becomes self-executory. When 'recours' is not suspended the sentence is still self-executory, unless the right of 'recours' or 'pouvoir' is invoked. Trial records are not automatically reviewed as in the American system,²⁵ but only on demand. 'Recours' is fairly frequently but not generally invoked.

'Recours' may be exercised of right by any person found guilty by a 'conseil de guerre,' except of course when suspended, and it may also be invoked in certain cases by the 'commissaire.' The 'conseils de révision' are permanent bodies in continuous session, their number and seat depending on presidential decree. The court is composed of a president, a civilian magistrate, an assistant president, also a civilian magistrate, and three field officers. 'Recours' from a regional 'conseil' is to one of the three permanent 'conseils de révision.' In addition there is a single 'conseil de révision aux armées' for appeals from the 'conseils de guerre aux armées.' The scope of the reviewing function is limited to these grounds: the legality of the composition of the 'conseil de guerre'; jurisdiction over the accused; the legality of the sentence and its applicability to the finding of facts; violation or omission of those formalities prescribed as substantial ('sous peine d'être frappé de nullité'); failure to rule upon a demand of the accused or of the prosecution based on a privilege or right accorded by the law.

'Recours' may also be exercised by the 'commissaire' under certain circumstances. If the accused has been acquitted this proceeding may be instituted 'dans l'intérêt de la loi,' but a reversal ('annulation') is without prejudice whatsoever to the accused. The aim is thus to secure a consistent and correct application of the law. If the prisoner was found guilty and sentence was imposed, the commissaire may invoke this 'recours' only upon the claim that the sentence was erroneous.

In principle the proceeding is purely one of error without examination of the evidence and a modification of a judgment of guilty is not possible. The judgment is either affirmed in toto or the judgment is annulled and the case sent back to the 'commissaire' for proper disposition. A judgment of guilty may be annulled with 'renvoi' for new trial on other charges or may be annulled without any 'renvoi' if the findings of fact constitute no legal offense, if

25. To this last statement exception must now be noted where the accused is acquitted or found not guilty of any charge or specifications, under the new Articles of War, Act of June 4, 1920, Ch. 2, Sec. I, Art 40.

amnesty has been pronounced, or if the statutory prescription has run.

The Code also provides an extraordinary and supplemental error proceeding known as the '*pourvoi en cassation*' addressed to the *Cour de Cassation*. It can not be invoked prior to the time allowed for a '*recours*' or until the '*conseil de révision*' has passed upon the '*recours*.' The sole ground of the '*pourvoi*' is the alleged want of jurisdiction over the person. It is not available to any person in time of war when the '*recours*' has been suspended. This proceeding is not open to the '*militaires*,' to persons assimilated to the military forces, to those within the jurisdiction of the '*conseils de guerre aux armées*' or to those in a besieged stronghold. It thus may be invoked only by civilians tried by the regional '*conseils*' and then upon the sole ground of want of jurisdiction. There is no '*pourvoi*' from a judgment of a '*conseil de guerre aux armées*.'

V

OTHER TRIBUNALS

The '*prévôté*' or military gendarmerie exercises the functions of military police and also has jurisdiction upon enemy territory, over camp followers, vagabonds, and prisoners of war who are not officers. Six months' arrest and two hundred francs fine, with jurisdiction over civil claims for damages not in excess of one hundred and fifty francs, are the limits of its powers. There is no formal procedure, as the '*plainte*' may emanate from any person, the reference for trial may be ordered by any military authority and there is no appeal from the findings. An officer of the '*prévôté*' exercises the functions of sole judge.

Under a decree of 1870 the machinery for courts-martial ('*cours-martiales*') was created for time of war. When the recent war broke out a decree of September 6, 1914, set up such tribunals as a temporary measure, to function within the armies in the field under orders of the commanding general, as a special kind of '*conseil de guerre aux armées*' with jurisdiction over the armed forces in cases of '*flagrant délit*.' This decree of 1914 was ratified as having the effect of law by the law of March 30, 1915, but owing to the change in the general attitude on these matters this law was repealed by that of April 27, 1916,²⁶ which suppressed '*cours-martiales*' entirely. Experience had shown the dangers of a justice too summary in its procedure.

26. Art. 6.

VI

OFFENSES

The code of 1857, which also incorporates by reference certain sections of the Code Pénal, enumerates the various offenses of military and civilian character over which the 'conseils de guerre' have jurisdiction when such crime or 'délit' is committed by a 'militaire.' The jurisdiction over civilians, concurrent with that of the civil courts and conferred by the law of 1916, covers a long list of offenses previously made punishable under the Code Pénal, which may be roughly classed as follows: intelligence or commerce with the enemy, espionage, fraudulent action against the state in any department of the government, interference with government work in government shops, laboratories, etc., riot, sabotage, provocation of mutiny, riot or sabotage, corruption of public officials, crimes against the security of the state. This act of 1916²⁷ repealed a surviving article of the old law of 1849,²⁸ which provided that in time of siege "the military tribunals may take jurisdiction of crimes and offenses against the safety of the state, against the constitution, against order and the public peace, whatever be the status of the authors, principals, or accomplices." In actual practice the civil courts functioning in territory other than that expressly included in the jurisdiction of the 'conseils aux armées' continued even during the war of 1914-18 placed within the concurrent powers of the military courts by the to exercise jurisdiction over many of the crimes and misdemeanors law of 1916.²⁹

27. Art. 6.

28. Loi du 9 août, 1849.

29. No mention has been made of military justice as applied in the French navy. The organization of the 'conseils de guerre pour l'armée de mer,' their jurisdiction, procedure and the appellate proceedings are substantially the same as in the system for the land forces.

IMPRISONMENT FOR CIVIL OBLIGATIONS IN ILLINOIS

BY EMANUEL R. PARNASS

The first Illinois Constitutional Convention¹ declared that—

“No person shall be imprisoned for debt unless upon refusing to deliver up his estate for the benefit of his creditors in such a manner as shall be prescribed by law, or in cases where there is a strong presumption of fraud.”

The second² and third³ constitutions of our state repeated in identical language the principle enunciated in the first, to the end that, “the general, great and essential principles of liberty and free government may be recognized and unalterably established.”⁴

The constitutional provision in regard to imprisonment for debt received its first judicial interpretation in 1852 in the case of the *People ex rel. Brennan v. Cotton*.⁵ Referring to Art. XIII, sec. 15 of the Constitution of 1848, the court said at p. 415:

“This prohibition applies only to actions upon contracts, express or implied. It does not extend to actions for torts. The design is to relieve debtors from imprisonment who are unable to perform their engagements. . . . The relator was not arrested on account of a debt. The judgment against him was founded upon a tort.”

This view was later reaffirmed.⁶ Adopting the interpretations of our Supreme Court, the fundamental law of this state may be stated thus: No person shall be imprisoned for or on account of any contractual obligation, express or implied, unless upon his refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law or in cases where there is a strong presumption of fraud.

Consonant with the constitution, the mere adjudgment of an obligation incurred by contract,⁷ either express or implied, has, in

1. Const. of 1818, Art. VIII, sec. 15.

2. Const. of 1848, Art. XIII, sec. 15.

3. Const. of 1870, Art. II, sec. 12.

4. Const. of 1848, Art. XIII, introductory clause.

5. 14 Ill. 414.

6. *McKindley et al. v. Rising* (1862), 28 Ill. 337; and *Kennedy et al. v. People* (1887), 122 Ill. 649. In the latter case, the constitutional prohibition against imprisonment for debt was also held inapplicable to imprisonment for non-payment of costs.

7. In *Whalen v. Billings* (1902), 104 Ill. App. 281, it was held that under secs. 42 and 47 of the Chancery Act, a ca. sa. may issue from the chancery courts to enforce a personal decree.

this state, never been sufficient ground for the incarceration of a judgment debtor. Something more was, by our statutes, always required—some act on the part of the debtor which threatened or had resulted in a fraud or wrong on the creditor.

The conditions precedent to the issuing of a *capias satisfaciendum* which our statutes have prescribed at different times are as follows: 1. That an order granting a *ca. sa.* shall issue from some judicial officer. 2. That such order be based on an affidavit filed by the creditor, his agent or attorney reciting the facts and grounds which, under the statutes, justified an execution against the body.

By our statutes, execution against the body of a contract defendant could issue only after an execution against his property had been returned unsatisfied and if it appeared either: 1. That defendant debtor was about to abscond out of the county wherein he lived, or wherein judgment was obtained.⁸ 2. That defendant debtor, after demand, refused to surrender his property not exempt, in satisfaction of the execution.⁹ 3. That debtor had fraudulently concealed or transferred property.¹⁰

8. An act to abolish imprisonment for debt in certain cases. Sec. 3, p. 158, Laws of 1823: "Be it further enacted that if it shall satisfactorily appear by the return of any officer aforesaid that the defendant or defendants have no other property to be found, his, her or their body or bodies shall not be arrested by virtue of any process whatever whenever issued upon such judgment or judgments unless the plaintiff or plaintiffs in such suit, his, her or their agent or attorney shall swear before some justice of the peace or justice of the circuit court that he, she or they verily believe that the defendant or defendants intend or are about to remove or abscond out of the county in which such judgment was obtained or in which such defendant or defendants reside, in which case it shall be lawful to issue a *capias satisfaciendum* against the body or bodies of such defendant or defendants."

This is no longer the law, although a similar provision was contained in the statutes of 1845. See *Stafford v. Low*, 20 Ill. 152, at page 155.

9. Revised Statutes 1845, p. 282, sec. 1: "Whenever any debtor shall refuse to surrender his or her estate, lands, tenements, goods or chattels, for the satisfaction of any execution which may be issued against the property of any such debtor, it shall and may be lawful for the plaintiff in such execution, or his or her attorney or agent, to make affidavit of such fact before any justice of the peace of the county; and upon filing such affidavit, with the clerk of the court from which the execution issued, or with the justice of the peace who issued such execution, it shall be lawful for such clerk or justice of the peace, as the case may be, to issue a *ca. sa.* against the body of such defendant in execution."

10. Par. 6809, Chap. 77, Vol. 4, J and A: "If, upon the return of an execution unsatisfied, in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit stating that demand has been made upon the debtor for the surrender of his estate, goods, chattels, lands and tenements, for the satisfaction of such execution, and that he verily believes such debtor has estate, goods, chattels, lands or tenements, not exempt from execution, which he unjustly refuses to surrender, or that since the debt was contracted, or cause of action accrued, the debtor has fraudulently conveyed, concealed, or otherwise disposed of some part of his estate with a design to secure the same to his own use, or defraud his creditors; and also setting

In construing the statutes, the Supreme Court, in *McDonald v. Wilkie*¹¹ held that an execution must first issue against the debtor's property before one can lawfully issue (from a justice of the peace) against his body. In *Strode v. Broadwall*¹² the court quoted with approval the doctrine that the imprisonment is not for the debt, but for the wrongful act in trying to avoid its payment.

The courts have also held, at least by implication, that the execution against the property of the contract debtor must be returned unsatisfied as the act of the sheriff and not as a result of the order of the creditor's attorney, and have said that—

"A stricter rule applies in cases where a capias against the body of the defendant depends upon the return of an execution than where the return is for the purpose of furnishing a basis to resort to equitable proceedings by way of a creditor's bill."¹³

But the question of the sheriff's return, so far as the issuance of a ca. sa. is concerned, is a purely academic one, since it is not the practice of those officers to recite that the return was made on order of the creditor's attorney, even when such was in fact the case, and the truth of the return will not be questioned except in a direct action against the officer for a false return.¹⁴

The courts have also held that the imprisonment of a contract debtor on a ca. sa. issued without an affidavit is illegal.¹⁵ The cases dealing with the sufficiency of the affidavit,¹⁶ however, have not been harmonious. Thus the Supreme Court, in construing sec. 8, Chap. 14, of the laws of 1845, quoted above, in the case of *Fergus v. Hoard*,¹⁷ has held that the affidavit need not show that a personal demand was made by the sheriff upon the defendant for the surrender of his property and the satisfaction of the judgment and need not, in fact,

forth upon his knowledge, information and belief, in either case, the facts tending to show that such belief is well founded, and shall procure the order of the judge of the court from which the execution issued, or of any judge or master in chancery in the same county, certifying that probable cause be shown in such affidavit to authorize the issuing of an execution against the body of the debtor, and ordering that such writ be issued; upon the filing of such affidavit and order with the clerk, he shall issue an execution against the body of such judgment debtor."

11. (1851) 13 Ill. 22.

12. (1865) 36 Ill. 419.

13. *Illinois Malleable Iron Co. v. Graham* (1894), 55 Ill. App. 266.

14. *Huntingdon v. Metzger* (1895), 158 Ill. 272.

15. *In re Salisbury* (1854), 16 Ill. 349.

16. Writs of ca. sa. issued on insufficient or defective affidavits should be quashed on motion before the court wherein judgment was obtained. This is better practice than setting out insufficiency or defects in petition for discharge, or seeking release on writ of habeas corpus. See *Doty v. Colton* (1878), 90 Ill. 453, and *Huntingdon v. Metzger*, supra.

17. (1853) 15 Ill. 357.

be the case. This view was later modified in a learned and very lucid and logical opinion by Justice Breese in the case of *Tuttle v. Wilson*,¹⁸ in which it was held that there was no justification for seizure of the body of a defendant until a demand had been made on him or some excuse has been given for not making it.¹⁹

The safeguards which have been thrown around the issuance of a ca. sa. against persons who have incurred contractual obligations, and the conditions which have been prescribed have not been provided in the case of the tort-feasor. As we have already seen, there is no constitutional inhibition against imprisonment of persons who have incurred a tort liability although its basis may be no more blameworthy and deserving thereof than technical debt unimpugned by fraud.²⁰ Statutory authorization of execution against the body

18. (1860) 24 Ill. 553.

19. In referring to the necessity of a demand, the court said at p. 559: "We do not think that the averment that he has refused to surrender his property necessarily implies that he has property liable to execution nor do we think he should be considered so in default, as to justify seizing his body until a demand has been made upon him to produce or show property, or some excuse given for not making a demand. . . . How can he be said to refuse until a demand is made? Such averments in the affidavit would make a case contemplated by the constitution. Having property liable to execution, and a personal demand being made to turn it out to be levied on, and a refusal, or an excuse shown for not making a demand, makes out one case specified in the constitution, and they would make out the other also, as raising a strong presumption of fraud. A party can hardly be said to refuse to deliver up his property until a demand has been made upon him, where it is practicable to make a demand. It is quite possible he may not know of the writ being in the hands of the officer, so that he could answer to it. Nor is it exactly fair to infer in such a case that a defendant in execution has estate, lands and tenements, goods or chattels, from the simple averment that he refuses to deliver up his 'property and estate.'"

In construing sec. 62, Chap. 77, of the Act of 1872, entitled "Judgments and Decrees" (Vol. 4 J and A, p. 3731), which provides that a judgment creditor must make an affidavit stating that a demand has been made upon the debtor to surrender his estate, goods, chattels, lands and tenements for the satisfaction of the execution, before he can have execution against the body of the debtor, the Appellate Court, in *Maher v. Huette* (1881), 10 Ill. App. 56, said at p. 59: "His being in debt does not subject him to arrest; neither does the fact that he suffers an execution to remain in the hands of the officer unsatisfied when he is of sufficient ability to pay it." and at p. 60: "It is part of the statutory proof required, to make the debtor guilty of a refusal to deliver up his estate for the benefit of creditors within the meaning of the constitutional provision. We do not think that the demand by the officer in this case is a substantial compliance with the statute. Reading the execution to a debtor, and asking him to pay or satisfy it, is not equivalent to a demand upon him to surrender his property to be levied upon for the purpose of satisfying such execution."

20. In the recent case of the *People v. Walker* (1919), 286 Ill. 541, the court held that at the time when a ca. sa. issues on a tort judgment from the clerk of court wherein the judgment was obtained, the question of malice is immaterial. Thus the first opportunity to raise the point apparently is by petition to the county court. Query: Could the point, in view of the language of the *Marshall Field & Co.* case, cited elsewhere herein, be raised on motion to quash, before the court which entered the judgment?

prior to the revised statutes of 1845 made no specific mention of torts. The revised statutes of 1845, making a fine distinction, provided that the requirements of compliance with Chap. 52 in the issuance of body executions shall not prevent body executions where the judgment was for a tort or trespass.²¹

The revised statutes of 1874, embodying the Act of 1872, specifically excluded tort judgments from the operation of the prohibition of execution against the body.²²

The recent case of *Marshall Field & Co. v. Freed*²³ disclosed that a plaintiff who secures a tort judgment is unburdened with any conditions or requirements whatsoever and can secure a ca. sa. on his judgment immediately on its entry and without any further order

21. Revised Statutes 1845, "Judgments and Executions," Chap. 57, sec. 5, p. 301: "It shall be lawful for the party in whose favor any judgment as aforesaid may be obtained, to have execution in the usual form, directed to any county in this state, against the goods, chattels, lands and tenements of said party defendant, or upon his body when the same is authorized by law, provided that no execution shall issue against the body of such debtor, except as provided in Ch. 52 of the R. S." (Chap. 52 is the Insolvent Debtor's Act.)

Sec. 6: "Nothing herein shall restrain or prevent any execution from being issued against the body of any defendant where the judgment shall have been obtained for a tort or trespass committed by such defendant."

It would seem that after 1845, tort judgment creditors were relieved from the requirement of an affidavit reciting the issuance of an execution against the defendant's property, and his refusal to surrender his property to satisfy it, or other fraud, but the practice of filing affidavits continued. See, for example, *Tuttle v. Wilson*, supra. It is to be noted, however, that in the *Tuttle* case, application for a ca. sa. was made after execution against the debtor's property had issued, and not in the first instance.

22. Sec. 5, Chap. 77: "Judgments and Executions," par. 6751, Vol. 4, J and A, p. 3685: "No execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum* (respondendum) as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors."

23. (1915) 269 Ill. 558. The court said at p. 559: "In the case before us the judgment was in an action of tort in which malice was the gist of the action. The judgment was the authority for issuing an execution against the body, and not a showing by affidavit, under the provisions of section 62, that the debtor had property which he unjustly refused to surrender, or that since the debt was contracted he had fraudulently conveyed, concealed or otherwise disposed of property with a desire to secure the same to his own use or to defraud his creditors. . . . Under sec. 5, if the judgment is for a tort committed by the defendant, an execution against the body is authorized without regard to whether the defendant has or has not property and without regard to whether he has refused to deliver his estate up for the benefit of his creditors."

The facts in the case were as follows: Field & Co. secured judgment by default in the Superior Court of Cook County against Fried in a suit wherein he was charged with procuring goods from the plaintiff by fraud and deceit and a false statement in writing. After an execution against the defendant's property had been returned *nulla bona*, a ca. sa. issued on order of the court which was subsequently quashed on motion, and on motion to vacate being denied there was an appeal to the Appellate Court wherein the Superior Court was affirmed.

of court. He can pursue both execution against the defendant's goods and body until satisfaction and is not forced to elect between the two.²⁴ Under sec. 5, Chap. 77, quoted below, he need not file an affidavit; ca. sa. will issue from the clerk of the court wherein judgment was obtained, merely on the authority of the judgment.²⁵ The court in that case also held that sec. 62 provides for tort and contract judgment creditors with an added authorization for a ca. sa. distinct from sec. 5.²⁶

Offensive and defensive instruments habitually develop side by side, each aiming to overcome the other. Thus the legal system which presents the creditor with the weapon of imprisonment has provided the debtor with means of procuring his release in certain cases and under prescribed conditions, although it is true that the legislation which has been passed from time to time for the relief of insolvent debtors does not, perhaps justly, relieve all defendants.

For a century it has been possible for contract debtors to secure their release from imprisonment. Thus the first general assembly provided that a debtor who in conformity with an act passed by it, surrendered his property for the benefit of his creditors should be discharged from arrest and imprisonment.²⁷ Legislation on the subject was also passed at the three following sessions.

24. In the case of *Schwarschild & Sulsberger v. Goldstein* (1905), 121 Ill. App. 1, wherein the plaintiff recovered a judgment in trover before a justice of the peace and a ca. sa. issued after an execution against the defendant's goods had been returned unsatisfied, the court said at p. 3: "Section 3 of Article 11 of the act in relation to justices of the peace and constables is as follows: 'Upon all judgments in actions of tort, or where the defendant is in custody, or has been held to bail upon a *capias*, as provided in this act, the justice may issue an execution against the body or goods and chattels of the defendant, at the election of the plaintiff.' Hurd's Stat. 1903, p. 167 . . . the section expressly mentions two things and requires the plaintiff to elect between the two, namely, between an execution against the body and an execution against the goods and chattels of the defendant. . . . Had the legislature intended that plaintiff should, in cases *ex delicto*, have both remedies, it would have been so expressed, as in the case of a fine imposed by a justice in the exercise of his criminal jurisdiction.

25. To the same effect see the *People v. Walker* (1919), 286 Ill. 541; *Leonard v. Leonard* (1917), 204 Ill. App. 375; *Nelson v. Swanson* (1914), 186 Ill. App. 632, and *Kitterman v. People* (1913), 181 Ill. App. 682.

26. The court says at p. 563: "The purpose of section 62 was to authorize an execution against the body upon any judgment, whether in tort or upon a contract, if the plaintiff in the judgment will file an affidavit complying with the requirements of that section."

27. Laws of 1819: "An act for the benefit of Insolvent Debtors," approved March 27, 1819, sec. 1, p. 301: "Be it enacted by, etc., that no person shall be imprisoned for debt, who shall deliver up his or her estate, in the manner hereinafter pointed out."

Sec. 2, p. 301: "Be it further enacted that it shall be lawful for any debtor about to be imprisoned by virtue of any original, meane or final process issued for or on account of any debt, it shall be the duty of the sheriff, coroner, constable or other officer charged with the service and execution of

The contract debtor who has been arrested or imprisoned on a ca. sa. may secure his discharge in one of two ways. It has already been pointed out that a ca. sa. cannot issue against such a debtor except on affidavit of the creditor to the effect that his judgment debtor has either refused to surrender his estate to satisfy an execution or was otherwise guilty of fraud. On application to the county court, which has exclusive original jurisdiction of such matters,²⁸ the debtor may have the truth of the facts alleged in the affidavit tried by a jury, and on a finding of "not guilty," is entitled to be discharged.²⁹ If found "guilty," a contract debtor may still secure

such process to accompany him to some county commissioner of the county and it shall be lawful for such debtor, in the presence of such commissioner, to make out and subscribe a list of all his estate, real and personal, and make oath, and swear to the effect following, viz: 'I, A. B., in the presence of Almighty God, do solemnly swear, or affirm, as the case may be, the schedule now delivered and by me subscribed, doth contain to the best of my knowledge and remembrance, a full, true, just and perfect account and discovery of all the estate, goods and effects unto me, in anywise belonging, and such debts as are to me owing, or to any person interested for me; and all securities and contracts whereby any money may become payable, or any benefit, or advantage accruing to me, or to my use, or to any other person or persons in trust for me; I have not land, money, or any other estate, real or personal, possession, reversion or remainder, which is not set forth in this schedule, nor have I at any day or time, directly or indirectly sold, lessened or otherwise disposed of in trust or concealed all or any part of my lands, money, goods, stocks, debts, securities, contracts, or estates whereby to secure the same, or receive or expect any profit or advantage therefrom to defraud any creditor or creditors whom I am indebted to anywise howsoever.'

28. Sec. 1, Chap. 72: "Insolvent Debtors" (J and A, Vol. 3, p. 3420, par. 6198): "Be it enacted that the county courts shall have exclusive original jurisdiction in their respective counties in all applications for discharge from arrest or imprisonment under the provisions of this act, and shall be held to be always open and in session for the hearing of such applications."

29. Sec. 5, Chap. 72: "Insolvent Debtors" (par. 6202, p. 3422, Vol. 3, J and A): "When any debtor is arrested or imprisoned for debt upon charge of fraud, or upon execution on the charge of refusal to surrender his estate for the payment of any judgment, he shall be entitled, upon giving notice as provided in section 3 of this act, to have the question, whether he is guilty of such fraud, or has refused to surrender his estate, tried by a jury, who may be summoned, tried and selected for that purpose. If the jury shall find the debtor 'not guilty' of such fraud or refusal, as the case may be, the debtor shall be discharged from the arrest or imprisonment, and the creditor, at whose instance he was arrested or imprisoned, shall be adjudged to pay the costs of the arrest or imprisonment and of such proceeding. If the debtor shall be found 'guilty' of such fraud or refusal, he shall be remanded to the custody of the proper officer; but such finding shall not prevent his availing himself of the other provisions of this act."

In the case of *First National Bank v. Sanford* (1898), 83 Ill. App. 58, it was held that the plaintiff need prove his case merely by a preponderance of the evidence, the court saying at p. 62: "It seems to us that a rule requiring any greater degree of evidence than a mere preponderance upon any issue in a civil case, where only the private interests of the parties are in dispute, is exceptional and extreme and we are not disposed to extend the rule further than we shall be compelled to under the decisions to which we have referred. In all the cases where the rule has been applied some infamous crime has been charged, such as perjury, larceny, arson and the like. In the case presented the evidence tends to prove only that appellee paid money to his wife

his discharge on making an assignment of his property, in accordance with the provisions of the Insolvent Debtors' Act.³⁰

In the case of persons against whom tort judgments had been obtained, the laws have not been as liberal. Prior to 1861, it was impossible for an insolvent tort judgment debtor to secure his release, through the means granted contract judgment debtors by the Insolvent Debtors' Act since 1819.³¹

It was specifically held in the *People, etc., v. Cotton*,³² that the Insolvency Act of 1845 had no application to tort cases.³³ The act

with a design to secure the same to his own use and defraud his creditors. "If it is proper to apply the rule of reasonable doubt to the issue tried in this case, it would follow that it should be applied in all cases in chancery or at law where the question of a fraudulent disposition of property was in issue."

30. See sec. 5, Chap. 72, quoted in preceding note. Sec. 6, Chap. 72: "Insolvent Debtors" (par. 6203, p. 3422, Vol. 3, J and A): "When a debtor is brought before the judge of the county court, and is not discharged pursuant to the preceding section, the judge shall require of him a full, fair and complete schedule of all his estate, real or personal, including money, notes, bonds, bills, obligations and contracts for money or property of any and every description or kind, name or nature, whatsoever, together with a true and perfect account of all the debts which he shall or may be owing at the time; which schedule shall be subscribed by the debtor, who shall also take and subscribe the following oath or affirmation, to-wit." (Here follows the oath required.)

Sec. 9, Chap. 72: (Vol. 3, J and A, p. 3424): "If after full investigation, it shall appear to the court that the debtor has made a full, fair, and complete schedule of all his estate, and all debts which he may be owing at the time, as required by section 5 of the act, to which this is an amendment, and has not fraudulently conveyed, concealed, or otherwise disposed of, some part of his estate, with a design to secure the same to his own use, or defraud his creditors, or has not wilfully misused or expended his goods or estate, or some part thereof, for the purpose of defrauding his creditors, it shall be the duty of the court to designate and set out to the debtor such property mentioned in the schedule as is exempt from execution, and to appoint some fit person to act as assignee of the debtor."

Sec. 11, Chap. 72: (Vol. 3, J and A, par. 6208): "Whenever the said debtor shall produce to the court the receipt of the assignee of such debtor, certifying that he has received all the estate so assigned to him, together with the evidences of indebtedness to, and the books of account of such debtor, if any, showing the accounts owing to such debtor, the court shall enter an order discharging such debtor from arrest or imprisonment."

31. By sec. 8 of "An Act for the Benefit of Insolvent Debtors," Laws of 1819, p. 304, it was provided that "any person" confined in jail on final process, may procure his release on the surrender of his estate for the benefit of his creditors. It is, however, doubtful whether a tort defendant could avail himself of the benefit of this section since the Insolvent Debtor's Acts, prior to 1861, were repeatedly held applicable to contract debtors only. This view is strengthened by the fact that the Act of 1861 specifically included certain tort defendants within its purview, and that in 1845 the legislature passed a special act for the relief of defendants who could not be discharged under the provisions of the Insolvent Debtor's Act.

32. *Supra*.

33. That the Insolvency Act of 1845 was not intended to apply to all cases is apparent from an act passed in 1845, entitled "An Act for the Further Restriction of Imprisonment for Debt," Laws of 1845, p. 77. In this act it was provided, *inter alia*, that a prisoner discharged for failure of the

of 1861³⁴ was the first to extend the benefits of the state insolvency laws to tort cases, but restricted its relief to those wherein the judgment was not obtained in an action of which malice was the gist. The act of 1872 repeated this proviso.³⁵

When a tort-feasor confined in the county jail by virtue of a ca. sa. seeks to secure his discharge by virtue of the provisions of the Insolvent Debtors' Act by petitioning the county court in conformity with the statutes, the immediate and vital question becomes whether or not malice was the gist of the original action wherein judgment was obtained. It is to be noted that the question is not whether or not malice was the gist of the original cause of action of the plaintiff, but whether it was the gist of the action which he in fact brought against the defendant.³⁶ When then, in the law, is "malice the gist of the action,"³⁷ and how is factual malice determined? In the leading case of *First National Bank of Flora v.*

creditor to advance jail fees is not to be re-arrested or imprisoned the second time on the same judgment. Subsequent statutes have not retained this proviso.

34. An act to amend Ch. 52 of the Revised Statutes of 1845, entitled "Insolvent Debtors," Laws of 1861, p. 178: Sec. 1. . . . That in all cases when any person is, or shall be, imprisoned or arrested by virtue of final process issued upon a judgment rendered in an action of trespass or trespass on the case, when said action was founded upon or grew out of a contract, express or implied, and when malice was not the gist of said action, such person shall be entitled to release his or her body from such arrest or imprisonment by scheduling and delivering up his or her property, for the benefit of his or her creditors, including the judgment on which he or she is held, as aforesaid, in the manner and pursuant to the provisions of Chap. 52 of the R. S. of 1845, entitled "Insolvent Debtors."

35. See sec. 2, Chap. 52, Vol. 3, J and A, p. 3420.

36. In *Keller, Ettinger & Fink v. Morton* (1907), 228 Ill. 356, the court said at p. 359: "The court refused to admit evidence offered by appellants extrinsic to the record of the Superior Court for the purpose of showing that there was malice on the part of appellee in the original transaction out of which the suit in the Superior Court grew. . . . Upon compliance with the provisions of section 2, supra, the debtor is entitled to his discharge 'when malice is not the gist of the action,' which means the gist of the action which was in fact brought against him, and not the gist of an action which might have been, but which, in fact, was not, carved out of the original transaction or transactions." To the same effect, see *Pet. of Mansfield* (1905), 120 Ill. App. 511, at 515.

37. The first case wherein the court was confronted with the determination of the question of malice as the gist of the action was that of the *People ex rel. Livergood v. Greer* (1867), 43 Ill. 213. That was an application for a mandamus against a county judge to appoint an assignee and discharge the petitioner from custody under a ca. sa. which had issued on a judgment against the petitioner in an action for seduction. The court said at p. 216: "The wrong for which the judgment was rendered against the relator did not originate in malice; malice was not the gist of the action for which recovery was had against him."

In *Inglert v. Kors* (1914), 187 Ill. App. 467, the Appellate Court held that malice was the gist of an action for alienation of affections.

Malice was also held to be the gist of an action of assault and battery: In *re Murphy* (1884), 109 Ill. 31, In *re Mullin et al.* (1886), 118 Ill. 551,

Burkett,³⁸ the facts were as follows: The defendant, after pledging with the bank as security for a loan, a bill of lading for hogs shipped to commission merchants for sale, together with a draft drawn by him on the merchants, collected from the merchants the entire sum due him before the draft was presented. The court at p. 394 said as follows:

"What, then, is malice? In the case of *Harpham v. Whitney*, 77 Ill. 32, the case of *Mitchell v. Jenkins*, 5 B and A 594, was referred to as defining malice. It was there said by Parke, J., 'that the term 'malice' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives.'

"That definition was applied in a case of malicious prosecution. The term has been defined: 'A formed design of doing mischief to another'—'a wicked intention to do an injury to another.' Thus, the forsaking of a husband or wife of the other, without sufficient cause, is said to be a malicious abandonment. Malicious mischief is the wanton or reckless destruction of or injury to property. It in some cases implies a wrong inflicted on another with an evil intent or purpose, and this is the sense in which it is employed in this statute. It requires the intentional perpetration of an injury or wrong on another. The wrong and intention to commit the injury are necessary to deprive the party of the right of a discharge from arrest or imprisonment. In this case there was an intentional wrong, little, if anything, short of a criminal act, and it was malicious, in the statutory sense."

"Being malicious, was it the *gist* of the action? The *gist* is defined to be the cause for which an action will lie—the ground or foundation of a suit, without which it would not be maintainable—the essential ground or object of a suit, and without which there is not a cause of action. In this case an action on the case would not have been maintained had not the defendant wrongfully and dishonestly drawn the money for which the hogs were sold, and for which he had given a draft

Masterson v. Furman (1899), 89 Ill. App. 291, and *Pet. of Kutterman v. People* (1913), 181 Ill. App. 682. In the *Masterson* case, the court said at p. 293: ". . . In a simple action of trespass vi et armis, malice is not an element essential to recovery, and hence not gist of the action. Nevertheless . . . malice is the gist of the action within the meaning of the provisions of our Insolvency Act."

Malice held gist of malicious prosecution in *Beckman v. Menge* (1899), 82 Ill. App. 228; of false imprisonment, *Amborn v. Smyser* (1913), 182 Ill. App. 208; of slander, in re *Pet. of Warnke* (1917), 207 Ill. App. 459.

In regard to conversion, the rule seems to be that only where the declaration charges the conversion as having been fraudulent and malicious or where the jury has so found specially, is the defendant precluded from the relief of the Insolvency Act. See *Jernberg v. Mix* (1902), 100 Ill. App. 264, affirmed in 199 Ill. 254; *Pet. of Mansfield* (1905), 120 Ill. App. 511; *Biebel v. Kuttbauer* (1909), 147 Ill. App. 627; in re *Pet. of Witske* (1915), 195 Ill. App. 206; in re *Pet. of Sawick* (1917), 207 Ill. App. 100.

38. (1882) 101 Ill. 391.

to the bank on Green, Huddleson & Co., and for which draft the bank paid him. This fraud was of the essence or foundation of the action, and in the statutory sense it was both wicked and malicious."

The second question which is presented to the county court on the petition is whether or not there has been such an adjudication that malice was the gist of the original suit that the doctrine of *res judicata* applies and precludes the county court from re-trying that issue. It was said in the case of *Jernberg v. Mix*³⁹ that the question whether malice is the gist of an action must be determined from the face of the record where the record affords the means of such determination.⁴⁰ If the question has been adjudicated in the *nisi prius* court, it is not open to the county court to determine whether the findings were justified by the evidence or to review the rulings of the *nisi prius* court. Its examination of the record is confined to ascertaining from it whether the question *has been adjudicated* and not whether it has been *properly* adjudicated.⁴¹ The pleadings and findings of the jury are important indicia. Where there is but one

39. (1902) 199 Ill. 254.

40. In this connection it is to be remembered that the municipal courts, unlike those of the justices of the peace, are courts of record.

In *Blathau v. Evans* (1894), 57 Ill. App. 311, where on hearing of the petition for leave to schedule and be discharged under the provisions of the insolvent debtor laws, the petitioner rested his case on a memorandum of the word "assumpsit" in the docket of the justice of the peace, the court held that the petition was properly denied by the county court since the petitioner had failed to show that malice was not the gist of the action before the justice, observing at p. 314, that "a suit before a justice of the peace is not what he may see fit to call it, but there being no written pleadings, is such as the evidence makes it."

In *Rex v. People* (1912), 166 Ill. App. 607, wherein a *ca. sa.* issued on a judgment in a fourth-class suit in the municipal court, the court said at p. 608: "As we understand the argument of the appellant, it is that because the case was what is known as a fourth-class case in the municipal court—in which class of cases written pleadings are not required—the same rule will govern as would control in a similar case heard by a justice of the peace. The case of *Edgerton v. C. R. I. & P. R. Co.*, 240 Ill., is cited as controlling upon us in that respect. In that case the question was whether the action was on contract or in tort, and the court held that it being a case of the fourth-class in the municipal court, and pleadings not being required, the same rule will govern as controls the form of action before justices of the peace; that while the suit was against several and the judgment taken against one only, the judgment might be upheld as an action of tort, although the action in tort appears to have been made in form as if it were an action on contract. In our opinion this case is not authority for the proposition that the municipal court of the City of Chicago is not a court of record as to all classes of cases. In *Gorra v. Sobra*, 151 Ill. App. 288, it was held that 'the municipal court is a court of record, and its jurisdiction, as defined by statute, is far from making it a court of like jurisdiction with a justice court. This is too plain for argument.' It also has been frequently held by this court, as well as by the Supreme Court of the state, that where malice is the gist of the action the court must look to the record only."

41. *Drygalski v. Thiele* (1911), 163 Ill. App. 290.

count in the declaration and that one alleges a tort of which malice is the gist, a general verdict of guilty will preclude the admission before the county court of any further evidence.⁴² When malice is the gist of each of several counts, their number is immaterial, although it has been the practice to confine the declaration to one count, and a general verdict of guilty prevents the county court from considering any other or additional evidence.⁴³ Where there are several counts in the declaration and malice is not the gist of all, a general verdict of guilty without a special finding, which discloses that the basis of the general verdict was a count of which malice was the gist, will leave the question of malice open to further and additional proof before the county court.⁴⁴

Since under the provisions of the Insolvent Debtors' Act, the petitioner is entitled to avail himself of the benefits of the act only on condition that malice was not the gist of the action wherein judgment was obtained, his is the burden of proving that his case is one within the condition.⁴⁵

42. *Masterson v. Furman*, *supra*.

In *Ettinger v. Morton* (1907), 131 Ill. App. 521, the court said at p. 526: "In our opinion the court ruled correctly in excluding the evidence offered for the recovery (in the original action) was had upon that count, and by that declaration alone it must be determined whether malice was the gist of the action." See also *Biebel v. Kuttmauer*, *supra*, and *Pet. of Radtke* (1912), 171 Ill. App. 462.

43. *Salomon v. Buechele* (1906), 127 Ill. App. 420. The court in that case said at p. 421: "Everyone of the five counts in the declaration commences with the statement that appellant Solomon 'with force and arms assaulted the plaintiff and beat, bruised, wounded and ill-treated him.' . . . Each count in the declaration is in accordance with approved precedents in actions of trespass for assault and battery," and at p. 421: "It follows that the judgment of the Superior Court upon which the capias was issued is conclusive upon the question that malice was the gist of the action. *Jernberg v. Mix*, 199 Ill. 254. Appellant, therefore had no right to have that question retried upon his petition for a discharge."

44. In *Kitson v. Farwell* (1890), 132 Ill. 327, the declaration contained several counts and only one set out proper allegations as for an action of trespass on the case for deceit. There was a general verdict of guilty. On hearing before the county court on petition for discharge under the Insolvent Debtor's Act, the court excluded evidence offered by the petitioner tending to show that the debt on which the original suit was brought was contracted bona fide. The court held that the judgment, under the pleadings, was not necessarily conclusive of the question as to whether malice was the gist of the action, and that the county court erred in excluding the offered evidence. See also *Sawyer v. Nelson* (1896), 160 Ill. 629; *Jernberg v. Mix* (*supra*); and *Kitson v. Ellinger* (1889), 35 Ill. App. 55.

45. In *Jernberg v. Mix*, *supra*, where there were several counts in the declaration and malice was not the gist of all, it was held that in such a case, *prima facie*, the record shows malice the gist of the original action, which the petitioner must rebut, i. e., the burden of proof is upon him. To the same effect are *Mahler v. Sinsheimer* (1886), 20 Ill. App. 401; *Blattau v. Evans*, *supra*, and *Matter of Hinson* (1911), 162 Ill. App. 121, but in *Sawyer et al. v. Nelson* (1895), 59 Ill. App. 46, affirmed in 160 Ill. 629, the court, said at p. 49: "The burden was upon the appellants (creditors), who invoked the estoppel

Formerly appeals from decisions of the county court in the matter of discharge of defendants from custody and imprisonment lay to the circuit courts, but with the enactment of the Appellate Court Act, it was held that the circuit courts were deprived of appellate jurisdiction of such matters, and the appellate courts substituted.⁴⁶

At common law imprisonment under a ca. sa. satisfied the judgment, but in this state imprisonment per se does not satisfy the debt,⁴⁷ although the judgment debtor is credited with one dollar and fifty cents for the time spent in jail under the ca. sa.⁴⁸ The rigor of the common law was further modified in 1887 by the limitation of imprisonment to the maximum of six months.

Thus almost two centuries after English debtors, seeking relief from the harsh laws of England, founded an American colony, the institution of the debtor's prison still prevails in Illinois and in other states of the Union, though many have abolished it altogether. It is true, of course, that in this state, continued incarceration is possible only where the defendant is guilty of a malicious tort or dishonestly refuses to surrender his property for the satisfaction of a judgment against him, or is guilty of other fraud. It is nevertheless to be noted that execution against the body even in such cases presents the anomaly of imposing a criminal consequence upon a civil judgment, a judgment which may have been entered by default, a judgment based on a verdict and on a trial of the issues wherein the charges need be proved merely by a preponderance of the evidence, and not, as in other cases where criminal consequences follow,

of the Superior Court judgment, to show with reasonable certainty what the facts were upon which that judgment rests."

In *Kitson v. Farwell*, supra, it was said that the proceedings for discharge are summary and that no pleadings are required.

46. *Grossglass v. von Bergen* (1906), 220 Ill. 340, affirming 121 Ill. App. 212; *Beckman v. Menge* (1899), 82 Ill. App. 228.

47. *Strode v. Broadwall* (1865), 36 Ill. 419.

48. Sec. 34, Chap. 72, "Insolvent Debtors," p. 3429, par. 6231, Vol. 3, J and A: "In any case where the defendant arrested upon final process shall not be entitled to relief under the provisions of this Act, if the plaintiff will advance the jail fees and board in manner hereinbefore provided, the defendant may be imprisoned at \$1.50 per day until the judgment shall be satisfied, and the officer making the arrest shall indorse the execution 'satisfied in full by imprisonment': provided that no person heretofore or hereafter imprisoned under the provisions of this act, shall be imprisoned for a longer period than six months from the date of arrest; and all persons imprisoned under the provisions of this act for the period of six months or more at the time this act takes effect, shall thereupon be immediately discharged; provided, however, that no person shall be released from imprisonment under this act who neglects or refuses to schedule in manner and form as provided by this act." See *Hanchett v. Weber* (1885), 17 Ill. App. 114; *Wiltshire v. Lambert* (1892), 44 Ill. App. 473.

beyond all reasonable doubt.⁴⁹ And it presents the further anomaly that a finding by a jury that the defendant was not guilty of refusal to surrender his property or of fraud, unlike other cases wherein a defendant is placed in jeopardy of his liberty, is not final, and there may be an appeal by the disgruntled creditor. And in the case of *Lasher v. Carey*,⁵⁰ decided in 1913, it was held that an assignment of a tort judgment by an instrument containing proper language to accomplish the intention will include an assignment of the right to imprison the defendant, thus making it possible for a stranger to the injury and hurt inflicted by the tort-feasor, to insist upon imprisonment of the latter.

49. *First National Bank v. Sanford*, *supra*.

50. 182 Ill. App. 147.

LAW FROM LAY CLASSICS¹

II

THE CAUSES OF DIFFICULTY IN THE ADMINISTRATION OF JUSTICE

WILLIAM PALEY, D. D.²

To a mind revolving upon the subject of human jurisprudence, there frequently occurs this question;— Why, since the maxims of natural justice are few and evident, do there arise so many doubts and controversies in their application? Or, in other words, how comes it to pass, that although the principles of the law of nature be simple, and for the most part sufficiently obvious, there should exist nevertheless, in every system of municipal laws, and in the actual administration of relative justice, numerous uncertainties and acknowledged difficulty? Whence, it may be asked, so much room for litigation, and so many subsisting disputes, if the rules of human duty be neither obscure nor dubious? If a system of morality, containing both the precepts of revelation, and the deductions of reason, may be comprised within the compass of one moderate volume; and the moralist be able, as he pretends, to describe the rights and obligations of mankind, in all the different relations they may hold to one another; what need of those codes of positive and particular institutions, of those tomes of statutes and reports, which require the employment of a long life even to peruse? And this question is imme-

1. [This series reproduces, from time to time, some of the choice passages in lay classics where the law, or our profession, has been treated in satiric or philosophic vein. The series is re-numbered consecutively in each volume of the Review.—Eds.]

2. [William Paley was born at Peterborough, England, in 1743. Educated at Christ's College, Cambridge, he lectured there as a fellow and tutor from 1768 to 1776. In the last mentioned year, he withdrew from academic life to enter the Anglican ministry, in which he continued until his death in 1805. His *Principles of Moral and Political Philosophy* appeared in 1785 while he was Archdeacon of Carlisle. The book immediately gained high favor and for years was regarded as the standard English work on its subject. The extract here presented is from Book VI, Chapter 8: "Of the Administration of Justice." For its selection we are indebted to John Townshend, Esq., the editor of the American edition of *Ram's Science of Legal Judgment*, who printed it in the appendix to that work (New York, 1871). Though colored by the views of a now obsolete school of thought, its accurate and discriminating analysis of the moving forces of forensic controversy gives it enduring value. The text here followed is that of the edition of 1817, pp. 394-403 (London, printed for Baldwin & Co. et al).—R. W. M.]

diately connected with the argument which has been discussed in the preceding paragraph; for, unless there be found some greater uncertainty in the law of nature, or what may be called natural equity, when it comes to be applied to real cases and to actual adjudication, than what appears in the rules and principles of the science, as delivered in the writings of those who treat of the subject, it were better that the determination of every cause should be left to the conscience of the judge, unfettered by precedents and authorities; since the very purpose for which these are introduced, is to give a certainty to judicial proceedings, which such proceedings would want without them.

Now, to account for the existence of so many sources of litigation, notwithstanding the clearness and perfection of natural justice, it should be observed, in the first place, that treatises of morality always suppose facts to be ascertained; and not only so, but the intention likewise of the parties to be known and laid bare. For example, when we pronounce that promises ought to be fulfilled in that sense in which the promiser apprehended, at the time of making the promise, the other party received and understood it; the apprehension of one side, and the expectation of the other, must be discovered, before this rule can be reduced to practice, or applied to the determination of any actual dispute. Wherefore the discussion of facts which the moralist supposes to be settled, the discovery of intentions which he presumes to be known, still remain to exercise the inquiry of courts of justice. And as these facts and intentions are often to be inferred, or rather conjectured, from obscure indications, from suspicious testimony or from a comparison of opposite and contending probabilities, they afford a never failing supply of doubt and litigation. For which reason, as hath been observed in a former part of this Work, the science of morality is to be considered rather as a direction to the parties who are conscious of their own thoughts and motives and designs, and to which consciousness the teacher of morality constantly appeals, than as a guide to the judge, or to any third person, whose arbitration must proceed upon rules of evidence, and maxims of credibility, with which the moralist has no concern.

Secondly, there exists a multitude of cases, in which the law of nature, that is, the law of public expediency, prescribes nothing, except that some certain rule be adhered to, and that the rule actually established be preserved; it either being indifferent what rule obtains, or, out of many rules, no one being so much more advan-

tageous than the rest, as to recompense the inconveniency of an alteration. In all such cases, the law of nature sends us to the law of the land. She directs either that some fixed rule be introduced by an act of the legislature, or that the rule which accident, or custom, or common consent hath already established, be steadily maintained. Thus, in the descent of lands, or the inheritance of personals from intestate proprietors, whether the kindred of the grandmother, or of the great-grandmother, shall be preferred in the succession; whether the degrees of consanguinity shall be computed through the common ancestor, or from him; whether the widow shall take a third or a moiety of her husband's fortune; whether sons shall be preferred to daughters, or the elder to the younger; whether the distinction of age shall be regarded amongst sisters, as well as brothers; in these, and in a great variety of questions which the same subject supplies, the law of nature determines nothing. The only answers she returns to our inquiries is, that some certain and general rule be laid down by public authority; be obeyed when laid down; and that the quiet of the country be not disturbed, nor the expectation of heirs frustrated, by capricious innovations. This silence or neutrality of the law of nature, which we have exemplified in the case of intestacy, holds concerning a great part of the questions that relate to the right of acquisition of property. Recourse then must necessarily be had to statutes, or precedents, or usage, to fix what the law of nature has left loose. The interpretation of these statutes, the search after precedents, the investigation of customs, compose therefore an unavoidable, and at the same time a large and intricate portion of forensic business. Positive constitutions or judicial authorities are, in like manner, wanted to give precision to many things which are in their nature *indeterminate*. The age of legal discretion; at what time of life a person shall be deemed competent to the performance of any act which may bind his property; whether at twenty, or twenty-one, or earlier, or later, or at some point of time between these years, can be ascertained only by a positive rule of the society to which the party belongs. The line has not been drawn by nature; the human understanding advancing to maturity by insensible degrees, and its progress varying in different individuals. Yet it is necessary, for the sake of mutual security, that a precise age be fixed, and that what is fixed be known to all. It is on these occasions that the intervention of law supplies the inconstancy of nature. Again, there are other things which are perfectly *arbitrary*, and capable of no certainty but what is given to them by positive regulation. It is neces-

sary that a limited time should be assigned to the defendants, to plead to the complaints alleged against them; and also that the default of pleading within a certain time should be taken for a confession of the charge; but to how many days or months that term should be extended, though necessary to be known with certainty, cannot be known at all by any information which the law of nature affords. And the same remarks seem applicable to almost all those rules of proceeding which constitute what is called the practice of the courts, as they cannot be traced out by reasoning, they must be settled by authority.

Thirdly, in contracts, whether express or implied, which involve a great number of conditions; as in those which are entered into between masters and servants, principals and agents; many also of merchandise, or for works of art; some likewise which relate to the negotiation of money or bills, or to the acceptance of credit or security: the original design and expectation of the parties was, that both sides should be guided by the course and custom of the country in transactions of the same sort. Consequently, when these contracts come to be disputed, natural justice can only refer to that custom. But as such customs are not always sufficiently uniform or notorious, but often to be collected from the production and comparison of instances and accounts repugnant to one another; and each custom being only that, after all, which amongst a variety of usages seems to predominate; we have *here* also ample room for doubt and contest.

Fourthly, as the law of nature, founded in the very construction of human society, which is formed to endure through a series of perishing generations, requires that the just engagements a man enters into should continue in force beyond his own life; it follows, that the private rights of persons frequently depend upon what has been transacted, in times remote from the present by their ancestors or predecessors, by those under whom they claim, or to whose obligations they have succeeded. Thus the questions which usually arise between lords of manors and their tenants, between the king and those who claim royal franchises, or between them and the persons affected by these franchises, depend upon the terms of the original grant. In like manner, every dispute concerning tithes, in which an exemption or composition is pleaded, depends upon the agreement which took place between the predecessor of the claimant and the ancient owner of the land. The appeal to these grants and agreements is dictated by natural equity, as well as by the municipal law; but concerning the existence, or the conditions, of such old covenants, doubts will perpetually occur, to which the law of nature

affords no solution. The loss or decay of records, the perishableness of living memory, the corruptness and carelessness of tradition, all conspire to multiply uncertainties upon this head; what can not be produced or proved, must be left to loose and fallible presumption. Under the same head may be included another topic of altercation—the tracing out of boundaries, which time, or neglect, or unity of possession, or mixture of occupation, has confounded or obliterated. To which should be added, a difficulty which often presents itself in disputes concerning rights of *way*, both public and private, and of those easements which one man claims in another man's property; namely, that of distinguishing, after a lapse of years, the use of an indulgence from the exercise of a right.

Fifthly, the quantity or extent of any injury, even when the cause and author of it are known, is often dubious and undefined. If the injury consists in the loss of some specific right, the value of the right measures the amount of the injury; but what a man may have suffered in his person, from an assault; in his reputation, by slander; or in the comfort of his life, by the seduction of a wife or daughter; or what sum of money shall be deemed a reparation for the damage, can not be ascertained by any rules which the law of nature supplies. The law of nature commands, that reparation be made; and adds to her command, that, when the aggressor and the sufferer disagree, the damage be assessed by authorized and indifferent arbitrators. Here, then, recourse must be had to courts of law, not only with the permission, but in some measure by the direction, of natural justice.

Sixthly, when controversies arise in the interpretation of written laws, they, for the most part, arise upon some contingency which the composer of the law did not foresee or think of. In the adjudication of such case, this dilemma presents itself; if the laws be permitted to operate only upon the cases which were actually contemplated by the law-makers, they will always be found defective; if they be extended to every case to which the reasoning, and spirit, and expediency of the provision seem to belong, without any further evidence of the intention of the legislature, we shall allow to the judges a liberty of applying the law, which will fall very little short of the power of making it. If a literal construction be adhered to, the law will often fail of its end; if a loose and vague exposition be admitted, the law might as well have never been enacted; for this license will bring back into the subject all the discretion and uncertainty which it was the design of the legislature to take away. Courts of justice are, and always must be, embarrassed by these

opposite difficulties; and as it never can be known beforehand, in what degree either consideration may prevail in the mind of the judge, there remains an unavoidable cause of doubt, and a place for contention.

Seventhly, the deliberations of courts of justice upon every *new* question are encumbered with additional difficulties, in consequence of the authority which the judgment of the court possesses, as a precedent to future judicatures; which authority appertains not only to the conclusions the court delivers, but to the principles and arguments upon which they are built. The view of this effect makes it necessary for a judge to look beyond the case before him; and, beside the attention he owes to the truth and justice of the cause between the parties, to reflect whether the principles, and maxims, and reasonings, which he adopts and authorizes, can be applied with safety to all cases which admit of a comparison with the present. The decision of the cause, were the effects of the decision to stop there, might be easy; but the consequence of establishing the principle which such a decision assumes, may be difficult, though of the utmost importance to be foreseen and regulated.

Finally, after all the uncertainty and rest that can be given to points of law, either by the interposition of the legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still, namely, "the competition of opposite analogies." When a point of law has been once adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute; but questions arise which resemble this, only indirectly and in part, in certain views and circumstances, and which may seem to bear an equal or a greater affinity to other adjudged cases: questions which can be brought within any affixed rule only by analogy, and which hold a relation by analogy to different rules. It is by the urging of these different analogies that the contention of the bar is carried on; and it is in the comparison, adjustment, and reconciliation of them with one another; in the discerning of such distinctions; and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger; that the sagacity and wisdom of the court are seen and exercised. Amongst a thousand instances of this, we may cite one of general notoriety, in the con-

test that has lately been agitated concerning literary property.³ The personal industry which an author expends upon the composition of his work bears so near a resemblance to that by which every other kind of property is earned, or deserved, or acquired; or rather, there exists such a correspondency between what is created by the study of a man's mind, and the production of his labour in any other way of applying it, that he seems entitled to the same exclusive, assignable, and perpetual right in both; and that right to the same protection of law. This was the analogy contended for on one side. On the other hand, a book, as to the author's right in it, appears similar to an invention of art, as a machine, an engine, a medicine: and since the law permits these to be copied or imitated, except where an exclusive use or sale is reserved to an inventor by patent, the same liberty should be allowed in the publication and sale of books. This was the analogy maintained by the advocates of an open trade. And the competition of these opposite analogies constituted the difficulty of the case, as far as the same was argued or adjudged, upon principles of common law. One example may serve to illustrate our meaning, but whoever takes up a volume of Reports will find most of the arguments it contains capable of the same analysis, although the analogies, it must be confessed, are sometimes so entangled as not to be easily unravelled, or even perceived.

Doubtful and obscure points of law are not, however, nearly so numerous as they are apprehended to be. Out of the multitude of causes which, in the course of each year, are brought to trial in the metropolis or upon the circuits, they are few in which any point is reserved for the judgment of superior courts. Yet these few contain all the doubts with which the law is chargeable; for, as to the rest, the uncertainty, as hath been shown above, is not in the law, but in the means of human information.

3. [Mr. Townshend here notes that the case referred to is *Miller v. Taylor* (1769), 4 Burr. 2303.—R. W. M.]

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COMMENT ON RECENT CASES

PROPERTY—ESTATES—CONTINGENT REMAINDERS—MERGER.—It would seem the law on the much harried question of vested and contingent remainders in real property has just been augmented by a most valuable and succinct exposition of the distinction between contingent remainders and shifting or executory devises. The case in mind is that of *Cole v. Cole*, 292 Ill. 154, 126 N. E., 752 where X, the testator in a devise, after a *life estate* to his wife to continue until her death or remarriage, directed that his executors divide his estate

both real and personal into five equal portions (he had five children) and to "allot and deliver one of such five parts to each of my five children," for their lives. Then the testator provided for the disposition of each share after the deaths of the respective life tenants. As to the share of Julia B., a daughter, he provided that it should be held by said Julia B. for life and at her death, should be equally divided between her children, and if she have no children, then over. As to another part, that allotted to Sherman, a son, he provided that after that son's death, it should be equally divided among that son's children, and if he died leaving no children, then over.

The litigation involved a dispute as to the effect of the two limitations above referred to. On the one hand, it was insisted that the limitation over to the children of Julia B. and Sherman was a contingent remainder, which would be destroyed by an instrument entered into by the various heirs, the operation of which was to merge the life estates and the ultimate reversions. On the other hand, it was contended the limitation to the children was a vested one, subject to be divested by the limitation over, the theory being that the limitation over was an executory devise, and the supporters of this position pointed to the case of *Lachenmeyer v. Gehlbach*, 266 Ill. 11, to sustain that contention.

The court distinguishes the *Lachenmeyer* case from the situation in the case at bar, in that in the case at bar, at the death of the testator, neither life tenant, Julia B., or Sherman, ever had had any children, whereas, in the *Lachenmeyer* case, all the children were in being at that time, and ready to take whenever and however the life estate (of which the testator's wife was incumbent), terminated.

The distinction furnished by the juxtaposition of the two cases thus illustrated, i. e., the principal case on the one hand, and that of *Lachenmeyer v. Ghelbach* on the other, would seem valuable as facilitating the solution of many of the problems that arise in this particular angle of the law.

Of the authorities in the state upon the subject in recent times, attention is called to the two cases, *Robertson v. Guenther*, 241 Ill. 511-512, where the limitation after a life estate was to the children of the life tenant surviving her, and *Thomas v. Thomas*, 247 Ill. 546, where the direction was to divide the estate among the life tenant's children in fee at her death; the former case presenting an example of a contingent remainder whereas the latter presented one of a vested remainder.

For other recent examples of contingent remainders, reference is had to the following: X to A for life remainder to heirs of B, a living person. (*Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 414); X to A for life then to C, D and E, but if C, D or E die before X or A, leaving issue, then the issue of the one so dying to take the parents' share (*People v. Byrd*, 253 Ill. 226); X to A for life, remainder to X's six children, their heirs or the survivor of them (*Hull v. Ensinger*, 257 Ill. 162); X to A for life then to X's lineal

heirs, should there be any living, and if not to the heirs of his blood (*Barr v. Gardner*, 259 Ill. 258-260); X to A for life, remainder to the issue surviving A, but if none survive then to heirs of A (*Messer v. Baldaun*, 262 Ill. 50); X to A for life then to children of the body of A, but if A die without children then to the heirs of X, the limitation being by grant and A having no children in being at the date of the deed. (*Hill v. Hill*, 264 Ill. 220, 222-3); X to A for life, then to the surviving children of A, but if A have no such children, then to B and at B's death to her surviving children, and if B has no such children to her heirs, and if both A and B die leaving no children or descendants of a child, then to A's heirs (*Collins v. Sanitary District*, 270 Ill. 112-114); X to A for life remainder to A's children or to the survivors; being equivalent to the limitation, X to A for life remainder to such as survive A. (*Smith v. Chester*, 272 Ill. 439); X to A for life remainder in fee simple to the heirs of A's body (*Benson v. Tanner*, 276 Ill. 595); X to A for life then to surviving children and if there be none surviving, then to heirs of X (*Kamerer v. Kamerer*, 281 Ill. 591); X to A for life with power of sale in fee, and after A's death if power not executed to be sold and divided between the living heirs or their children (*Jones v. Miller*, 283 Ill. 355); X to A for life, then to the children surviving A, but if any die before A, then to their children if any (*Friedman v. Friedman*, 283 Ill. 388); X to children of X for life, remainder to their descendants per stirpes in fee, but if any children die leaving no lineal descendants living at their death, then over (*Spatz v. Paulus*, 285 Ill. 84, 92).

The cases say the distinction is found in the uncertainty of the right to take, as against, merely, an uncertainty of enjoyment (*Meldahl v. Wallace*, 270 Ill. 28; (*Smith v. Chester*, 272 Ill. 436-437; *Jones v. Miller*, 283 Ill. 355), and this uncertainty of the right to take is a matter depending upon intention (*Jones v. Miller*, supra), as in the case where the testator expressly stated it to be his intention that the estate go to such children only as attain majority (*Shered v. Blume*, 290 Ill. 512). The application of this element of intention is forcibly illustrated by a comparison of the two cases (*Northern Trust Co. v. Wheaton*, 249 Ill. 609-612-613) and (*Meldahl v. Wallace*, 270 Ill. 229-230). In the former, X devised to A, B and C with the limitation, in the event of the death of either before the interest should vest in them, to the others. In the second of the two cases, X granted his estate to A, B and C, his daughters, in trust, for himself for life and at his death to divide the estate equally between themselves; he included provision giving the daughters power to will their shares, but provided that in case of the death of any before his death, the share of such deceased should go to her children. In the former of the two cases, the court held the interest vested subject to be divested. In the latter the court was swayed by the consideration, there apparent, that the various provisions for a disposal of the shares in the event of a failure of any of the daughters to execute the power of disposal given, would

have been unnecessary if the shares vested, and from that gathers the intention to have been for the shares to be contingent only.

One additional case, possibly, should be noted, the case of *Bush v. Hamill*, 273 Ill. 134, where the limitation centered about the phrase, "In case my grandson shall live to attain the age of twenty-one years." This phrase standing alone, the court says, would be indicative of an intention for the grandson's interest to be contingent on his attaining that age. But additional facts were present. The grandson in fact received the income prior to that time and was to receive full interest on arriving at that age, and this induced the court to the conclusion that his interest vested at once, subject to be divested in the event he failed to reach the age of twenty-one years.

E. M. L.

PROPERTY—CONTINGENT REMAINDERS—MERGER.—It would seem apparent from the recent case of *Biwer v. Martin*, 294 Ill. 488, 128 N. E. 518, that the old authorities had not said all that there was to be said about what has all along been considered the almost archaic common law of real property; for that case now lays down another exception to the time honored rule of destructibility of contingent remainders by merger of the particular life estate and the ultimate remainder in fee. The effect of the decision in that case would seem to be that a contingent remainder is indestructible if created by a warranty deed.

The case seems to treat the question as *res nova*, at least in this state, if not, indeed, generally, and in this the opinion, apparently, is correct, for Fearn, the great authority upon the subject of contingent remainders, does not seem to have covered this particular question, and his modern expositors, Professors Gray and Kales, do not touch upon it. Upon the question then, Is the conclusion of the court in the principal case correct? it would seem, almost, the answer is found in the query: Is the argumentation whereby the conclusion is reached correct?

Possibly the foundation of any 'exegesis' on common law destructibility of contingent remainders, is found in the language from Fearn on "Contingent Remainders" (Vol. I, p. 318, 4th Am. ed.):

"For that if the particular estates which support contingent remainders are not in esse when the contingency happens, the contingent estates can never arise, whether it happens by surrender, merger or any other way."

And again, from the same authority (*id.*, p. 340):

"It is said by Lord Chief Justice Hale, in the case of *Purefoy v. Rogers*, that in all cases where the particular estate is merged in the reversion, there the contingent remainder is gone though there be no divesting of any estate. As if there be a tenant for life, remainder in tail in contingency, remainder in tail in esse levy a fine, this is no discontinuance, no divesting of any estate, because each gives such estate as he has; and yet the mean contingent remainder is destroyed."

Thus it would seem that the destructibility of the contingent remainder at common law, resulted from the mere coexistence of the particular freehold estate for life and the ultimate reversion in the same tenant, and did not operate by way of divesting any estate.

But it is apprehended that the conclusion of the principal case proceeds from the same ratiocination that results in the conclusion that a warranty deed will convey a contingent remainder, viz., that the grantor and his heirs will be estopped by force of the warranty in the deed, to deny the effect of the deed to convey the contingent remainder. Fearné refers to the same consideration in the effect of levying a fine to convey a contingent remainder, and that suggests the idea that the old conveyances could have prevented the destructibility of contingent remainders much easier than by creating trusts to preserve the contingent remainders as they did (Fearné, "Contingent Remainders," 4th Am. ed., Vol. 1, p. 326), had they created their contingent remainders by levying a fine; for the estoppel element in that form of conveyance must necessarily have operated there, as it did in a conveyance of a contingent remainder already created. In other words, if at common law a conveyance by way of levying a fine operated to convey a contingent remainder in the same way that the modern warranty deed now does, why should it not at common law have produced an indestructible contingent remainder as, according to the principal case, a modern statutory deed now does? Yet it seems none of the conveyancers thought of that.

However, the fact that such form of conveyance does not seem to have been employed for that purpose, is no refutation of the position taken by the principal case, and upon that observation attention is called to the note which appears at the bottom of p. 380 in Fearné (Fearné, "Contingent Remainders," 4th Am. ed., p. 380) to the effect that where a lease and release creating remainders contains a covenant to levy a fine to preserve the remainders, a fine afterwards levied will have that effect. From which, it is submitted, it may be argued, that that covenant is effective to preserve the remainders by its operation on the privies in estate to the grantor in the lease and release, the same position upon which the principal case relies for its decision.

E. M. L.

PROPERTY—ESTATES—CONTINGENT REMAINDERS.—In *Stevens v. Van Brocklin*, 295 Ill. 435, 129 N. E. 68, X, a testator, devised land to his wife for life, and upon her death to I. H. S. as long as she and her husband, H. W. S., live, and, in the event of his death, to I. H. S. absolutely, and in the event of her death prior to that of her husband, then over. The question involved was whether the limitation over was one of contingent remainder, or one of executory devise. If it was one of contingent remainder, then the remainders were destructible by merger of the particular estates with the ultimate reversion, but if the limitation over was one of executory devise, i. e., if I. H. S. took a vested remainder subject to be divested upon her death prior to that of her husband, the

interest over, contingent though it be upon that happening, was not subject to be destroyed.

For a construction of that situation two considerations presented themselves: *First*, where an estate may pass as by the common law, it will so pass and will not pass as by the Statute of Uses (Kales, "Estates, Future Interests," 2nd ed., sec. 67); *second*, a remainder is contingent when it is limited to take effect upon an event which might happen either before or at the time of or after the particular estate of freehold.

Applying the first of those considerations to the situation thus projected, it must be apparent that the particular estate was one for the period of the lives of I. H. S. and her husband. If by the language the limitations following the words that created that particular estate were intended to take effect only upon the natural termination of that estate, then truly the limitations over would be in as of the common law, there being then no gap or lap and the fee going either to I. H. S. by merger (upon her husband's death her life estate and the remainder would merge) or to the children of I. H. S. and her husband, H. W. S., by purchase under the will. But if, on the other hand, a proper construction of that language evolved an intention on the part of the testator to cut short the particular estate (which was for a life or lives) in the event I. H. S. predeceased her said husband, then the limitation over could not take effect as by common law, but would have to take effect, if at all, by force of the Statute of Uses, for there would be a shifting from the particular estate in freehold to a limitation over in fee. The court, in the principal case, seems to proceed upon the construction that the particular estate was intended to endure for the full period of the lives of I. H. S. and H. W. S. and the life of the survivor of them, and then the remainder would go theoretically to the heirs of I. H. S. by inheritance (in its actual operation, there would be a merger in I. H. S. at the death of her husband) or to the children of I. H. S. and H. W. S. by purchase under the will, depending upon which way the double contingency might swing, i. e., depending upon whether I. H. S. survived H. W. S. or not. And if that construction is correct, that result must follow. And as the law considers each will sufficiently unique in itself to render of little force other adjudicated cases of wills, unless a case be found in every respect identical (*Walker v. Walker*, 283 Ill. 30), it would seem there can be no quarrel with that construction.

That application of the first consideration, it seems, disposes of the second consideration in this case, as the limitation over to the children is one to take effect upon the death of I. H. S. before her husband, and that event might, on that construction of the will, happen before, or it might happen at the time of the termination of the particular estate; or, it might not happen until after the termination of the particular estate, as where that estate terminates by merger, as, indeed, it did in the present case.

E. M. L.

PROPERTY—ESTATES—CONTINGENT REMAINDERS—POSSIBILITY OF ISSUE.—The recent case of *Hill v. Sangamon Loan & Trust Company*, 295 Ill. 619, 129 N. E. 551, was one of limitation by will, as follows: X to A for life, then to the lineal descendants of A, surviving A, and if none such surviving then to such lineal descendants of X as A might appoint, and in default of such appointment, then over. The widow of the testator and all the children of the testator but one (including the life tenants) conveyed to appellant, but the life tenants excepted their life estates. The case arose on bill for partition brought on the theory that the life tenants (who were childless) had passed the age when they could have children, and so the contingency of the life tenants (A, in the problem above) having lineal descendants surviving them, was determined and the ultimate remainder should be decreed vested. Without considering the complication introduced by the power of appointment as given, the court was of opinion that as a matter of real property law, possibility of issue was extinct only upon death and not before, and therefore the contingency of lineal descendants being born and surviving was not terminated. That, of course, obviated the need for passing on the effect the conveyance to appellant had upon the power of appointment, which, likely, was extinguished thereby (*Baker v. Wilmot*, 288 Ill. 438, 439).

It is interesting to observe that here is one case where the device of merger was not resorted to to accomplish the destruction of the contingent remainder (as indeed it might have been) for the life tenants expressly reserved their life estates.

E. M. L.

CONTINGENT REMAINDERS, DESTRUCTIBILITY BY MERGER—ANTECEDENTS AND CONSEQUENCES OF BOND V. MOORE, 1908, 236 ILL. 576—BIWER V. MARTIN, 1920, 294 ILL. 488—APPLICATIONS OF COVENANTS FOR TITLE—ESTOPPEL.—It is only twelve years since Professor Schofield, commenting in this REVIEW (Vol. IV, pp. 355-60) upon the case of *Bond v. Moore* (1908), 236 Ill. 576, protested against the establishment in this state of the doctrine of destructibility of contingent remainders—in that case by merger. As Mr. Schofield pointed out, "The view that this part of the doctrine, or any other part of it, is not now, and never was, the law of Illinois, seems not to have been presented to the court at all. If it was presented, no notice of the argument in its support is taken in the opinions filed" (*ubi sup.* 356). It is proposed, in the present comment, I, to consider the state of the authorities in Illinois preceding *Bond v. Moore*; II, to consider in the light of the preceding examination, what the Supreme Court actually did in *Bond v. Moore*, examining in this connection, briefly, the general development of contingent remainders as "property"; III, to review the cases in which that decision has been followed; and IV, to consider the present state of the law and what changes are desirable.

I.

On the general problem of destructibility of contingent remainders there was very little to be found in the Illinois reports down to 1908. The statutes and cases bearing on the subject were as follows:

(1) By statute since 1837, a contingent remainderman in womb at the time when the particular estate ends is protected as being already "born"; but this provision seems still to have left no traces in the Illinois reports (see Kales, "Estates, Future Interests," 1920, sec. 326).

(2) In *Frazer v. Supervisors of Peoria County* (1874), 74 Ill. 282, the question before the court involved section 6 of the Conveyancing Act. A deed was made to an unmarried woman and the heirs of her body; which gave to the latter a contingent remainder—in other words, made the first estate one for life, as it was conditionally, before De Donis (1285); and the woman reconveyed before having issue. The question was, Was the remainder destroyed? The court held that it was not. Though the Act separates the limitations as before 1285 the court held that they should not have the qualities attributed to them either before or after 1285. In the court's opinion, not only had the statute abolished entails, but by its provision that the remaindermen *should take*, by the instrument creating the estates, a fee simple absolute, it had impliedly denied "in the most unmistakable manner, any and all inference that the donee might dock the remainder, or that the donor should ever have the reversion, except on failure of the issue" (p. 288). Having excluded any "doubt or possibility of a reversion" (p. 289), having also (sec. 14) expressly provided that the remainder needs no particular estate to support it, it followed that in this non-feudal age no further fears were to be felt about abeyance of the fee—and that when the life tenant reconveyed to the donor this left the contingent remainder unaffected. The liberalism of the court was admirable, but the reasoning was defective. It denied that there was *any* reversion; and so there could be no merger. But until born, remaindermen cannot take an absolute estate, and the court was therefore forced to admit a "contingent reversion" (p. 290) in the donor; but any reversion was necessarily vested and alienable. Had the court simply repudiated the whole doctrine of destructibility of contingent remainders it might never have survived.

The result has been, in later cases: first, that the *Frazer* case has stood as a narrow statutory exception to the rule of destructibility; and second, that, rejecting the argument that the fee may be in abeyance and that no reversion is in the donor, and even fastening upon the "contingent reversion" expressions in the opinion as a reason for citing it as authority for the proposition that the donor does hold the reversion—this last principle has been established, thereby preparing the way for mergers and destructions *ad libitum* outside the narrow protection of the statute under the *Frazer* decision. And even that, we shall see, has now been swept away. It is worth while

to note the process. Thus, in *Bond v. Moore* (236 Ill. at 593) the court said of the *Fraser* case: "The case deals with an estate tail only under our statute and is a case of statutory construction only, having nothing to do with the general question of the destruction of contingent remainders." Upon which it may be remarked that, though it was possible to narrow the ostensible ratio decidendi of the case, nevertheless, even as dicta, the reasons of the court had a great deal to do with the question of the wisdom and necessity of introducing the rule of destructibility. The ideas deserved most careful consideration.

It is interesting to observe what the court in *Bond v. Moore* substituted in their place. It was necessary to accept the result, while at the same time distinctly declaring that the donor did hold the reversion (which of course thus became the meaning of the *Fraser* case), and substituting another reason for the broad liberalism of the earlier case. The new reason given was that one might safely be as liberal (but no more liberal, be it observed) in Illinois in 1908 as were the English courts six centuries ago, just after De Donis. "The doctrine of merger did not apply to estates tail under the statute de donis, which were an exception to the rule. Such estates were protected and preserved by the operation and construction given to the statute de donis for the express purpose of preventing the particular tenant from thus barring and destroying the estate tail." This is certainly delicious. How were contingent remainders protected? By judicial construction of the statute of 1285 by the judges of *that* time. On what ground? Public policy, and the intent of the settlor (see J. R. Rood, "The Struggle for a Perpetuity," Mich. L. R. VIII 181-198; Preston, "Conv.," 3rd ed. III, 342). By whom then, and on what ground, is the Illinois statute to be interpreted? Not by *Fraser v. Supervisors*, but by the judges just following 1285. Their views of public policy were held to be modern enough for us.

Still another comment upon *Bond v. Moore* is pertinent. Both courts, of course, modestly denied that they were putting *their* views into the statute. The onus is upon the General Assembly; it "did not intend to restore the common law as it stood before the adoption of the statute de donis." But pray why not? If the court is free, as in *Bond v. Moore*, to adopt any medievalism it pleases antedating 1604, is it not conceivable that the assembly (thinking even less of consequences) might "intend" to do the same? But of course this talk about the assembly's intent is a pretense. In the *Fraser* case the court refused, saying that the legislature did not intend, to adopt medievalism at all; in *Bond v. Moore* the real ratio decidendi of the *Fraser* case was swept aside, and the legislature was said to have adopted—and thus the earlier decision, in the interpretation now given to it, was made to adopt—certain medieval principles. But at all events, out of mercy to contingent remaindermen—or, rather, a particular type thereof—the law back of 1285 was not adopted. Should the court have given any heed whatever to the safety of those interests? Mr. Kales thinks that it should not: "it would

seem," he says "that the legislature fully accomplished its purpose when it created the future interest. Thereafter the estate of the unborn lineal heirs should be left to the mercy of the usual rules of law" ("Conditional and Future Interest," 1905, sec. 92; unchanged in "Estates, Future Interests," 1920, sec. 318). And to this opinion the court seems to have come in *Lewin v. Bell* (1918), 285 Ill. 227, for in that case *Frazer v. Supervisors of Peoria County*, though twice cited as authority for propositions (once, it would seem, clearly improperly), was *silently* overruled.

Of other cases up to the decision in *Bond v. Moore*, with the exception of *Gavin v. Curtin*, *infra*, not much need be said.—(3). In *Young v. Harkleroad* (1897), 166 Ill. 318, another case of contingent remainders to lineal heirs, in a class, there was a clear assumption that a contingent remainder will fail if the contingency has not been removed when the preceding vested estate comes to its natural end. But in that case the remainder did not actually fail, for one member of the class had qualified and was given the entire subject of gift.—(4). In *Madison v. Larmon* (1897), 170 Ill. 65, the principle that every remainder must be supported by a preceding vested estate, and that a contingent remainder will utterly fail unless it vests during the existence of the supporting estate or at the instant of its determination, was explicitly laid down in dictum.

(5) *Gavin v. Curtin* (1898), 171 Ill. 640, is most interesting. In that case there was a will of realty, creating life estates followed by contingent fees, and a bill was presented in equity stating that under a partition the petitioner, a life tenant, had been allotted in severalty certain vacant land; that its income was negligible, the petitioner without other means, and said property "exposed to danger of being lost to her and the remaindermen by reason of non-payment of taxes" and prospective special assessments (643); that she "could only convey a life-estate, which under the circumstances would . . . be valueless, and that, owing to the fact the remainder in fee is contingent, the fee could not be conveyed; . . . and that unless a remedy is provided . . . the fee must inevitably be lost to the remaindermen" (644). Whereupon, though there was nothing in the will's provisions that would have made the executors trustees, the court proceeded boldly to create a trust, the trustees to hold for the use of complainant for life, remainders as in the will; with power to sell and make the trust res productive (644-45). Now of course the court actually accomplished two things: it saved the property (which, *once a trust exists*, is of course a perfectly recognized procedure), and, by making the interests equitable, made them indestructible. And observe the basis that the court gave for its action! To create a trust, then order a change of the res against the admitted intent of the testator, and to hold that the personal consent of contingent remaindermen not in esse was unessential—that is, that they were properly represented and bound,—the court appealed simply to this principle: that "it was essential to the preservation of the rights and interests of all who are, or who, upon the contingency named in the will, may become, interested in

the land, that the power . . . should be exercised by the court" (646, 649). And the power was directly drawn from the principle that "equity will take jurisdiction in all cases where a right recognized by municipal law exists"—the right, namely (645, bottom), of a contingent remainderman to succeed to the land—"and courts of law do not provide an adequate remedy for the enforcement, maintenance, and protection of that right" (647).

Since the court based its action on fundamental equities, let us ask these questions: Is there any greater danger to a legal contingent interest through the destruction of the property than there is through destruction of that interest by merger? If a trust can be created to avoid the first, why not to avoid the second? And if the second can be indirectly accomplished, as it was here, why may it not be done directly?

In at least one American state, in the absence of a statute making contingent remainders indestructible, the courts have simply implied intervening limitations to trustees to preserve such remainders (*Kennard v. Kennard*, 1884, 63 N. H. 303; *Hayward v. Spaulding*, 1908, 75 id. 92; note in 22 Harv. L. R. 388). This is, of course, in flat contradiction to the legal rule that future interests must if possible be construed as remainders, and so, if contingent, kept destructible. But that rule was equally overridden in *Gavin v. Curtin*, supra. As Jessel said, however, "almost all the doctrines of equity were interferences with a legal right" originally (*Baker v. Sebright*, 1879, 13 Ch. Div. 186; compare *Pomeroy*, "Eq. Jur." 4th ed., sec. 47, 48, 54, 101, etc.). The New Hampshire cases were probate proceedings and a petition of an executor for instructions; compare *Sebree v. Sebree*, 1920, 293 Ill. 228, and *Anderson v. Anderson*, 1920, 293 Ill. 565. It must be admitted, of course, that the New Hampshire doctrine is quite contrary to general equity precedents. "Equity never hindered the destruction of contingent remainders by merger through collusion between the tenant for life and the vested remainderman; and even in cases where trustees to preserve contingent remainders were parties to the destruction, relief in equity could not always be given by preventing the merger, though the trustees would be ordered to make good the damage" (Challis, "Real P.," 1st ed. 73, 3d ed. 94; Spence, "Eq. Jur." II 948-51). Aside from cases, however, that rest upon statutes or that are fully explainable by the powers of equity courts to preserve trust estates and protect the interests of infants through sales and reinvestments, the basic principle of *Gavin v. Curtin* is sustained by *Coquillard v. Coquillard*, 113 N. E. (Ind. Ap.) 481; *Bedford v. Bedford*, 105 Ark. 580; *Ruggles v. Tyson*, 104 Wis. 500; *Bofill v. Fisher*, 3 Rich. Eq. 1; and the New Hampshire cases above cited.

(6) In *Thompson v. Adams*, 1903, 205 Ill. 552, a will was involved that purported to create a trust. In a bill brought for its construction the executor alleged a power of sale but prayed, alternatively, that, should the court find no power to sell and convey it should create a trust (560), allegations being made of the unproductive state of the property and danger that it would be sold for taxes

(560). The facts were merely weaker than in *Gavin v. Curtin*. The will contained "no words desiring or bequeathing property to any of the descendants of the testator, except words, directing distribution to them upon the re-marriage or death of the widow" (559). There was a fee reversion in the heirs of the testator, and as to at least part thereof merger with the widow's life estate and destruction of contingent remainders was possible. One wonders whether the court had in mind at all that possibility. It said:

"A trusteeship cannot be predicated of one who holds for life, only, and for his or her own sole use and benefit, and the instrument which gives the life estate also gives the remainder to others in their own right, and no duty other than those that grow out of their legal relation is imposed upon the life tenant" (*Schaefer v. Schaefer*, 141 Ill. 337). The rights, duties and obligations of the widow under this will . . . are those of a life tenant only. *The words used for the purpose of creating a trust may be rejected as surplusage* [p. 557] . . .

"It is within the jurisdiction and power of a court of equity to grant the alternative relief asked by this bill, against the express wish of the donor or testator, where the facts warrant, even where no trust exists (*Gavin v. Curtin*, supra); but in order to authorize the court to enter such decree it must appear to be necessary to do so, *where no trust exists*, for the purpose of preserving the property to the life tenant and the remaindermen. *Gavin v. Curtin*, supra; *Baldrige v. Coffey*, 184 Ill. 73" [p. 560-61].

Ignoring the general question of trusts (if threatened total loss justifies creation of a real trust, how much threatened loss will justify retaining and giving content to a declared trust?) and looking only at the point of interest for present purposes, we have to ask: If a trust may be *created* outright for remaindermen, thereby making their interests indestructible, why should not an existing trust, though with no other content than preservation of those interests because equitable, be *retained*? If our court will not solely for that purpose make a trust, as the court in New Hampshire will, because to do so would destroy the life tenant's *legal* right to destroy contingent remainders, what justification can be found for destroying the remainderman's *equitable* right to be immune from that legal doctrine? Trusts are not a matter of words, as the court said, and there was as much of active content to this "trust" as to any "trust to preserve contingent remainders" expressly declared.

(7) In *Harrison v. Weatherby*, 1899, 180 Ill. 418, and *Peterson v. Jackson*, 1902, 196 Ill. 40, the principle was definitely established that when a fee is given out by contingent remainder a reversion fee remains in the creator of the limitations, pending the removal of the contingency.

(8) In *Boatman v. Boatman*, 1902, 198 Ill. 414, the court resorted to a strained construction of the limitations—in fact, applied to them not the common law tests but that adopted in New York and the other states that have the New York statutory system

(compare Harv. Law R. XVI 307; XXII id., 234-35)—in order to hold remainders vested. The court gave as its reason that "The law favors the vesting of estates. Estates . . . will be regarded . . . as vested estates, and not contingent, unless it is manifest that contrary result was intended." It does not appear whether or not the court assumed this rule of the common law to be based upon a desire to avoid the destruction of contingent interests, and strained construction for that same purpose. The case was followed in *Chapin v. Nott* (1903), 203 Ill. 341, but both cases were overruled by *Golladay v. Knock* (1908), 235 Ill. 412.

II.

Such seems to have been the state of the authorities when *Bond v. Moore* was decided in 1908. Was not the court free? In 1905 Mr. Kales argued at length in his "Conditional and Future Interests" (sec. 81-92a; substantially the same in Law Q. Rev. XXI 118-37) that the rule making contingent remainders destructible "is not the law here" (his own words, in ILL. LAW REV. I 376, n. 12). In 1907 he stated that "it must still be quite uncertain" whether that rule was here in force (id. 376), although, in view of "the direct and pointed dictum" in *Madison v. Larmmon*, supra, he concluded that "apparently" the rule *was* law in Illinois (id. 378). But this is not all. Mr. Kales pointed out that the device of trustees to preserve legal contingent remainders was then "unknown" in Illinois (id. 378). Assuming the rule of destructibility to exist, he said:

"Thus far no striking use has been made of it, and no hard cases of its application have appeared in our reports. But we are apt at any time to have presented the case which caused the total abolition of the rule in England in 1877. . . . It would, it is believed, be a most excellent move if the legislature would put an end to the chance of such a result"—that is, the definite judicial establishment of the rule of destructibility—"before a similar case actually arises to throw scandal upon the law" (id. 378).

Unfortunately that very case was decided in the following year (perhaps it was already in sight when Mr. Kales wrote)—and unfortunately for us Mr. Kales happened to be of counsel for the parties whose interests demanded, and gained, the establishment of the archaic feudal rule in question.¹ In *Bond v. Moore* (236 Ill. 576)

1. In 1905, in Law Q. Rev., XXI, 118-37, and in his "Conditional and Future Interests," sec. 81-92a (the two are almost identical), Mr. Kales argued that the doctrine of destructibility of contingent remainders could be swept away in any American jurisdiction not already bound to it by precedent or conveyancing practice by simply following certain modern English cases and judicially construing contingent remainders themselves out of existence! Underlying this ingenious theory there were, first, an insistence upon the *real* intent of the creator of the limitations that his gifts or grants shall take effect; and, second, a consequent rejection of the feudal rule that limitations must, if possible, be construed as legal remainders, subject to the feudal infirmities thereof, and thereby be removed from the safety-zone of equitable limitations and executory devises. The idea was this: if the limi-

it was squarely held (by a court divided four to three) that when a life tenant, *under a will*, who was also the sole heir of the testatrix, conveyed both her life estate and her inherited fee reversion to a third party by deed, they merged, and an intervening contingent remainder, unprotected by a trust, was destroyed. Before referring to the decisions that have followed this precedent it is in point to notice what the court actually did, as contrasted with what it assumed to be doing.

The court referred to one Illinois case (*Field v. Peebles*, 1899, 180 Ill. 376) as establishing the general doctrine of merger—which was really beside the point; and to the dictum in *Madison v. Larmon*. Its other citations—to Blackstone, Preston, Fearn, and others—bore solely on the common law principle. As already shown it reduced from a ratio decidendi to a dictum the liberal ideas of *Frazer v. Supervisors*, supra, deliberately establishing in the law of the state “a feudal rule defeating intent which was illogical and incongruous after springing and shifting interest created by way of use or desire became valid and indestructible” (Kales, “Estates, Future Interests,” 1920, sec. 328). Was there any justification for such a decision? There were only dicta in favor of the rule in our reports. On the other side was a statutory rule protecting contingent remaindermen in womb; also a case protecting—by judicial interpretation of a statute that actually expressed no rule whatever—contingent remaindermen of a certain type, namely, heirs of the body of a living life tenant; and that case (as it stood, before the narrowing interpretation put upon it in *Bond v. Moore*) was rested upon a broad non-feudal policy—upon the policy and ideas that underlie all of the modern statutes that have abolished the rule of destructibility in sundry jurisdictions. The court in *Bond v. Moore* was certainly put upon notice by the cases already referred to; and Mr. Kales, the only writer in the state of established authority, had done all that one

tation be to A for life, and then to such of A's children as attain 21 either before or after A's death, the future interest is an indestructible executory limitation—so held in the English cases upon which Mr. Kales based his argument; but if the limitations be the same save that the “before or after A's death” be omitted, it is older law that the future interest is a destructible contingent remainder. But, Mr. Kales argued, the *real* intent of the creator of the limitations is in both cases identical. And since in every future interest held to be a contingent remainder there is in fact the possibility that the contingency may or may not be removed during the existence of the preceding state, it is therefore possible—simply by ignoring any difference between actual intention and actual *explicitly expressed* intention—to hold that contingent remainders need no longer be recognized! The argument was a strong one (compare Harv. L. R., XIX, 546-47); but to apply it in a court would have needed many times the judgment and courage displayed by the Illinois court in *Bond v. Moore*.

In an article on “Reforms in the Law of Future Interests Needed in Illinois,” published in 1907 (ILL. LAW REV., I, 311-28, 374-85), Mr. Kales argued for the statutory abolition of various “feudal rules defeating expressed intention”—among them the rule in Shelley's case, the rule of destructibility of contingent remainders, and the rule making such interests inalienable otherwise than by release or by a deed with covenants. It will be noted that despite the words “expressed intention,” unexpressed intent was in fact relied upon above—and compare the next footnote.

could do to prepare the way for the choice of modernism instead of medievalism.

In a recent merger case (*Gray v. Shinn*, 1920, 293 Ill. 573 at 581) the court said of the rule of destructibility: "This rule is recognized in *Bond v. Moore*." The rule was *not* "recognized" in that case; it was, so far as the law of this state is concerned, created. As a general question it may be possible to discuss with respect Blackstone's theory—the official theory of every court (though not of every judge)—that judges find the law in their bosoms (see Gray, "Nature and Sources of the Law," sec. 465-512), but in such a case as *Bond v. Moore* there is no room for discussion. It is settled that the non-statutory law of Illinois includes such portions of the English law antedating 1604 as are applicable to our condition. And the Supreme Court is uncontrolled in determining which portions shall be adopted as suitable to our conditions. The court in *Bond v. Moore* adopted destructibility by merger as a precious part of our legal birthright; it imported and for us created a rule that it was wholly free to regard as undesirable in Illinois in 1908.

Nor should a court ever forget, either, that legal rules exist to protect *interests* that are regarded as socially desirable and worthy of the ultimate sanctions provided in the law; and that when the court refuses protection it is in effect denying the social value of the interest concerned. The stock example of this in our legal history is, of course, the growth of the termor's remedies in the old law, coincidently with the break-down of the feudal conditions that had precluded recognition of his interest as worthy of protection in a feudal society. But the development of "expectancies" and "possibilities"—including contingent remainders—is precisely similar. In that development *Bond v. Moore* is a reactionary anachronism.

As the court has recently very truly said in *Gray v. Shinn* (293 Ill. 573, at 583):

"A contingent remainder was not regarded at common law as an estate. It was a mere contingency that might or might not ripen into an estate, and for that reason its intervention did not prevent a merger of the particular estate and remainder." This doubtless puts the result before the cause. The contingent remainder was not worth preserving, and that was shown, among various ways, in permitting its destruction by merger; and so in Illinois in 1908. As Joshua Williams put it, with reference to both alienability and destructibility:

"The law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of . . . for the sake of preserving unimpaired such vested estates as might happen to be subsisting. . . . The circumstance of a contingent remainder being still inalienable at law, is a curious relic of the ancient feudal system. This system, the fountain of our jurisprudence as to landed property, was strongly opposed to alienation. . . . The proper method, therefore, of explaining our laws, is not to set out with the notion that every subject of property may be aliened at pleasure. . . . The law itself began

in another way. When, and what manner, different kinds of property became subject to different modes of alienation is the matter to be explained. . . . But, as to such interests as remained inalienable, the reason of their being so was, that they had not been altered, but remain as they were. The statute of *Quia Emptores* expressly permitted the alienation of lands and tenements—an alienation which usage had already authorized; and ever since this statute, the ownership of an *estate* in lands (an estate tail excepted) has involved in it an undoubted power of conferring on another person the same, or perhaps more strictly, a similar estate. But a contingent remainder is no estate, it is merely a chance of having one; and the reason why it is not alienable at law, is simply because it has never been thought worth while to make it so." The quotation is from the first edition (1845) of the author's "Real Property" (pp. 215-16), when the law was still as it is today in Illinois; but an Act of that same year made possible the substitution of the past for the present tense in all future editions.

The point is absolutely fundamental, elementary or trivial as it may seem. It is the *interest* involved that comes first; its social value, its social recognition. Our court says, in *Gray v. Shinn*, *supra*, that the contingent remainder "was" regarded in a certain way; but the point is that it still is so regarded in Illinois, and the tense cannot be changed while we retain the medieval rule. And evidently the medieval rule implies the underlying medieval view that the interest is *not worth protecting*. Mr. Preston, at the beginning of his volume on Merger ("Conv." 3d ed. III, p. 15) pronounced it vain to seek "any precise principle of policy or of reason" upon which to rest the doctrine of merger; though he found its probable origin in the rule of feudal metaphysics that 'nemo potest esse dominus et tenens.' But certainly as time passed the only tenable explanation is that given by Mr. Williams.

It is evident that our adoption of the common law, if at all, as of 1604, inasmuch as it makes certain that whatever is adopted must be taken over in a relatively archaic stage, places upon our court the greater burden of making sure that rules adopted *are* suitable to our present day conditions. And of those conditions it must judge from the law prevailing in other states of this country. To what extent, then—our next question—were contingent remainders "property" when *Bond v. Moore* was decided? We may adopt for this purpose the practical definition of property given in the Slaughter-House Cases that it is anything of exchangeable value. The question becomes, then, Had the status of contingent interests changed so little, as respects alienability, since medieval times that the Illinois court was justified in denying them immunity against destruction by a technicality of feudal policy and law? An apology is surely due for retelling once more a story that has so many times been told, and with fuller space at command. Yet a summary statement, with as few references to authority as seems possible, is called for if the

anachronism of *Bond v. Moore* is to be given its proper setting in the general history of contingent remainders.

(a) No tenure properly served the ancient feudal lord save one for life at least; that alone was therefore recognized, that alone was the free-holding, and that alone was protected by—that is, found a place in—the feudal land law. It was created by giving seisin; and seisin, which was the legal, the legally-protected, possession of feudal times—that portion, in other words, of our modern “legal possession” which in those times was recognized—was the symbol of right and the claim for protection. Seisin implied control, just as physical control is today the first element of legal possession; control, at that time, implied a corporeal thing; and disseisin meant the loss of what the old cases called “property”—that is, involved an inability to claim legal remedies, or for practical purposes, as Dean Ames argued, the loss of ownership. (Ames, in Harv. L. Rev. III 23-40, 313-28, 337-46; Maitland in Law Q. Rev. II 481-96; Bordwell, in Harv. L. R. XXIX 374-94, 501-20, 731-51; Costigan, id. XIX 267-85). Contingent remainders, like terms for years, lay at first wholly outside the law, or were “void” (Litt. “Ten.,” sec. 721; Holdsworth, “Hist. E. L.” III 116-18); and this was because their holders could not be invested or clothed with seisin (Holdsworth, id. III 116; Preston, “Estates,” 1820, I pp. 62, 65, etc.; Hayes, “Introd. to Conv.,” 5th ed., 1840, p. 21-22; Spence, “Eq. Juris.” I 156; Bingham in Mich. L. R. V 497-99). (b) But it came to be recognized that an unknown or unborn remainderman might be identified, or the contingency upon which an identified person was to take *might* be satisfied, before or at the instant of the ending of the preceding and vested interest; in which case there would be no lap, gap, or abeyance in the holding the seisin, and no violation of the rule that contingent remainders must be supported by, and at the moment of vesting “fed” seisin either by or through, a preceding vested estate—all of these rules being derivative from the primary rules that the tenancy must always be full and that actual seisin could be in the immediate freehold only. Under these circumstances a contingent remainder would take effect without violating feudal rules. Consequently their validity was recognized; they took effect if events so fell out that the above rules remained unviolated, and otherwise were lost. Thus by the premature ending of the particular estate, either by its natural expiration as limited or by its unnatural termination by surrender, forfeiture for tortious alienation or other cause, discontinuance, or merger in a vested estate following the contingent interest, this last was destroyed. And several of these causes evidently lent themselves to the deliberate destruction of such interests. (c) Like rights of entry for condition broken or on disseisin, and even “bare possibilities” like that of an expectant heir, contingent remainders passed by descent (Co. Litt. 19th ed. 378b; Watk. “Descent,” 64, 5, 86 (1) and (4); Fearn, “Cont. R.” 10th ed. I 364, 559, and II sec. 742-48; Kales, “Estates, Future Interests,” 1920, sec. 324). (d) Until long after the adoption date, in Illinois, of the

English law, contingent interests, like rights of entry and possibilities of inheritance, were not devisable (Prest. "Estates," I 76, 89; Fearne, op. cit. I 366, and II sec. 752-53); but at the end of the eighteenth century they became so when the contingency was only as to an event but the person definite, in which case the possibility was said to be "coupled with an interest"—and this is the rule probably everywhere today, and in some of our states even when the expectant holder is not positively identified (Challis, "Real P." 3rd ed. 76-7; Col. L. R. IX 546-48; Mich. L. R. XV 175; Kales, "Estates, Future Interests," 1920, sec. 325; *Drury v. Drury*, 271 Ill. 336, 340). (e) As regards alienation inter vivos, the original hostility to all alienations, the confused distinction between "corporeal" and "incorporeal" hereditaments, and the metaphysical notions that prevailed regarding "expectancies" and "possibilities" (Fletcher, "Hist. Ess. on Conting. and Exec. Interests," 76; Spence, "Eq. Jur." I 291, II 855, 865; Digby, "Hist. R. P." 5th ed. 259; Sweet, Law Q. R. X 306 et seq.), stood in the way of permitting alienations of contingent remainders, rights of entry, and possibilities of inheritance, far more than they stood in the way of alienations of such interests as rights in alieno solo, which last, unlike the others, embraced a present right to assume some physical relationship to land. The first relaxation, naturally, was in the case of conveyances that at the same time *destroyed* the contingent remainders; that is, releases. The future development was very slow, but by statutes of the last century such interests became generally alienable in a large number of the states of this country, as in England; though in others, as in Illinois, it remains doubtful whether other modes of alienation are possible than those developed by the medieval law, namely, by estoppel (originally through fine or recovery, later through deeds with covenants) and release. Equity, however, gave aid by granting specific performance when the contingent interest had vested (Fearne, op. cit. I, pp. 365-66 and II sec. 749-56; Shep. "Touch.," Preston's ed., p. *239; Prest. "Est." I 76, 89; Spence, "Eq. Jur." II 910-12, 879; Holdsworth, "Hist. E. L." III 208; Pomeroy, "Eq. Jur.," 4th ed., sec. 1285-91; Kales, "Estates, Future Interests," sec. 320-320a, 374-77). (f) Equity, too, began to protect contingent remaindermen against waste by the life tenants, first when there were trusts to preserve the interests (Kerly, "Hist." 260), and later without that requirement.

It is very evident then that contingent remainders have been steadily developing for centuries into what is in the truest sense property; and in a very large number of our states this process has been completed by making them alienable inter vivos by the ordinary modes of conveyance, and by declaring them indestructible—the latter step having been taken by two American states prior to the English act of 1845. (Citations in Harv. L. R. XXVIII 193, n. 22 and XXX id. 226; Col. L. R. XIV 68, n. 14; Reeves "Real P." II, sec. 607 (a), 904; ILL. LAW REV. I 377, 380; Washburne, "Real P.," 6th ed., 554-57; for the English statutes, Jenks, "Mod. Land Law," 103-05, Fletcher, "Histor. Ess. on Conting. and Exec. Interests," 64-72, 191-93; older American statutes in Stimson, "Am. Stat. Law,"

sec. 1402-04, 1426; Tiffany, "Real P." 2d ed. I, 507, uses Stimson's old data only). In situations of the most varied nature their character as property has come before the courts in recent years. Are they liable to sale under execution (Kales, "Estates, Future Interests," 1920, sec. 309, 320, 376)? Are they assets in bankruptcy (Col. L. R. XIV 66-68)? Are they subject to inheritance taxes? and are they exempt under a statute passed during the contingency, on the ground that rights therein have not inured (Col. L. R. XII 727-28)? Are they protected as property under the 5th and 14th Amendments of the United States Constitution (Harv. L. R. XXVI 14-15)? Is the consent of contingent remaindermen, as beneficiaries under a trust, necessary for the revocation thereof (Col. L. R. XII 172-73; *Gavin v. Curtin*, 1898, 171 Ill. 640)? If such interests are mortgaged, may foreclosure be had while the contingency continues (Mich. L. R. XVII 338)? What about the representation of contingent remaindermen in equity suits (Col. L. R. XVI 675; *Gavin v. Curtin*, supra)? What about the sale of a debtor's reversion that is subject to divestment by the vesting of a contingent remainder (*Kamerer v. Kamerer*, 1917, 281 Ill. 587)?

This state of the law the court should have considered before deciding as it did in Bond v. Moore. Somewhere, far back, in the course of the development just sketched we now stand; just where it is impossible to say. With alienability probably restricted—certainly restricted, if when this question comes up it be decided in the spirit of *Bond v. Moore*—to extinction by releases and creative conveyances by estoppel (Kales, "Estates, Future Interests," 1920, sec. 320-25; and ILL. LAW REV. I 379) and with the rule of destructibility also established, is it not evident that in the evolution of these interests Illinois must lag a century or so behind other states of this country? The court was not bound in 1908 to continue the illiberal Illinois tradition. It should have taken the great step that it was free to take toward protecting contingent interests as property, instead of adding another illiberal medieval rule to our land law.

III.

But with this view of the basis and holding of *Bond v. Moore*, let us now proceed to consider the development of the rule of destructibility since that decision was rendered. In fifteen cases destruction of remainders by merger has already been recognized (*Bond v. Moore*, 1908, 236 id. 576; *Belding v. Parsons*, 1913, 258 id. 422; *Barr v. Gardner*, 1913, 259 id. 256; *Messer v. Baldwin*, 1914, 262 id. 48; *Smith v. Chester*, 1916, 272 id. 428; *Blakeley v. Mansfield*, 1916, 274 id. 133; *Benson v. Tanner*, 1917, 276 id. 594; *Friedman v. Friedman*, 1918, 283 id. 383; *McCarty v. McCarty*, 1918, 284 id. 196; *Spatz v. Paulus*, 1918, 285 id. 82; *Lewin v. Bell*, 1918, 285 id. 227; *Cole v. Cole*, 1920, 292 id. 154; *Gray v. Shinn*, 1920, 293 id. 573; *Braver v. Martin*, 1920, 294 id. 488; *Randolph v. Wilkinson*, 1920,

294 id. 508). In at least one more case, if remainders were properly construed as contingent, the application of the rule was overlooked (*Kleinhans v. Kleinhans*, 1912, 253 Ill. 620). There was apparently doubt for a time, after the decision of *Bond v. Moore*, whether the court would stand by the decision (compare Mr. Kales, ILL. LAW REV. IV 186), but the answer has become plain. In only a few of all the above cases is there anything in the opinion that indicates uneasiness regarding the rule enforced. In *Belding v. Parsons*, the first to follow the *Bond* case, the court remarked, in reversing the decree below, that this could not be sustained "without overruling that case and the many authorities cited in the opinion that support it" (258 Ill. at 426); none of them, as we have seen, of any weight on the question whether the rule *should* be established in Illinois. And, with a similar misapprehension of what its earlier decision had done, the court remarked that "in the absence of statutory prohibition" the authorities established the rule of *Bond v. Moore*; as though the court had not complete freedom in choosing to adopt or exclude the medieval rule, without instructions either one way or another from the legislature.

In the next eight cases decided no doubts or even discussions are to be found. On the contrary, in the last (*Spatz v. Paulus*, 285 Ill. at 94) the court remarked, "The law is settled in this state," and in *Cole v. Cole*, supra, at 170, the court characterized it as "well settled"; and in another case in which merger and destruction did not actually occur the court even indicated to creditors, for whose benefit a reversion subject to contingent remainders had been sold, that it would be worth more were these destroyed (*Kamerer v. Kamerer*, supra, at 591)—certainly an attitude shockingly inconsistent with the older standards of equity (compare ILL. LAW REV. IV 356).

The practice of conveyancers, then, would seem fixed. It must be confessed that there is a certain pleasure in dealing with even the plebeian problems of those metaphysical entities, such as no other legal system possesses, off one side from the land to which they relate, divisible in more or less fantastic fashion according to the calculus of our medieval law, which we call "estates." But how much greater must be the zest of the conveyancer who by manipulations of these estates, presses the *spes successionis* out of that still more metaphysical thing (while we *keep* it for such purposes in its medieval stage), a contingent remainder! In addition to which there are the practical interests of life tenants and reversioners that call for the destruction.² It is perfectly evident

2. Of course there is much to be said for the rule of destructibility *provided* one starts (compare the quotation from the Supreme Court on p. 601) with the benefit of the holders of immediate estates as the primary consideration. Even Mr. Kales, who has spoken such valiant words for reform, shows clearly in his writings the opposing attractions exercised, upon the reformer, by the idea of protecting, and, upon the practical lawyer, by the idea of destroying, contingent remainders. If the reader, with this in mind, will examine the article of 1907 cited in the preceding footnote (pp. 375-76, comparing with p. 378, n. 22, the little book written for correspondence students,

that conveyancers are developing the practice with ardor; and there is also good evidence that the lawyers of the state are uneasily examining titles and seeking light. The business of bribing holders of present estates to join in destroying property interests merely because they are not feudally vested in possession should be ended.

Fortunately, there are signs that the Supreme Court no longer feels that all is well. In *Lewin v. Bell*, supra, there is the first indication of this. The passage is worth quoting:

"The rule of the common law was that . . . if the particular estate came to an end before the time for vesting of the remainder the remainder would fail . . . That is *still the law* where the necessity of a preceding particular estate of freehold to support a contingent remainder *has not been abolished by statute* . . . The common law is still"—to wit since 1908!—"the law of this state. . . . The common law, which permitted the destruction of contingent remainders, *being unchanged by statute in this state*, the only method by which a testator devising such remainders can preserve them and prevent his intention being frustrated and his will defeated is *a resort to a trust*" (285 Ill. at 230).

This is certainly a precious situation. First, the court introduces the medieval doctrine of destructibility, and then, just as certain reformers under the Protectorate introduced trusts to

"Law of Real Property," 1913, sec. 54) he will find this fact interestingly and somewhat perplexingly illustrated.

More interesting, and in view of the inevitable influence of Mr. Kales' recent book important, is the apparent change in his attitude toward "intent." Thus, for example, in the 1907 article, *supra*, he urged the abolition of the rule in Shelley's case because it defeated "the intent" of the settler; "this, it is believed, sums up the argument for its abolition." Now, notice, the "intent" here involved is merely the generally expressed intent that the lineal heirs *shall take*, without saying (compare preceding footnote) that they shall take despite any efforts by the life tenant to bar them. This general intent is defeated by giving to the ancestor a fee and power to dock the entail. So in regard to contingent remainders, Mr. Kales once relied upon the actual intent, the *generally expressed* intent of the creator of the limitations, that these shall take effect, placing no insistence upon technical construction ("Contingent and Future Interests," 1905, pp. 115, 119, 123-24, 126, 130). Of course intent must be somehow expressed; the whole difficulty lies in saying how definitely expressed. In Mr. Kales' latest book ("Estates, Future Interests," 1920) it seems to the writer that in the treatment of construction (op. cit., Book II, passim) there is so much insistence upon the technical distinction between the settlor's desires—the "inducement" to his words—and the legal intendment of his expressions that, for example, no logical basis whatever remains for objecting to the old law's jealous rule that limitations must if possible be construed as remainders. That is, referring to the preceding footnote, the distinction taken in the English cases there referred to was quite *consistent with a technical requirement of exact expression of intent*; but the use which Mr. Kales suggested should be made of those cases *repudiated* utterly any such exact requirement. It would seem that in view of his new principles of construction he could not possibly in 1920 make the argument he made in 1905. Nevertheless, Mr. Kales still demands the abolition of the rule of destructibility on the ground that it defeats "intent" (op. cit., secs. 97, 106, 328, 329; on Rule in Shelley's case, 36, 441); and, which is especially interesting, he does still quarrel, on the same ground, with the rule that limitations must always, if possible, be construed as remainders (id. sec. 106).

protect remainders against what Cromwell characterized as the "ungodly land law" of the times, so now the court tells lawyers thus to protect their clients against the law made for us in 1908; or, if that seems inadequate, get a statute! Moreover, this reference to trusts is the first that the court made in any of its opinions above listed; and even that is balanced by the other suggestion, in the *Kamerer* case above noted, that the destruction of remainders is profitable (i. e. to the holders of life estates or reversions, or to their creditors).

Several cases decided in 1920 show very clearly increasing uneasiness regarding the whole doctrine. In *Gray v. Shinn*, supra, the attempt was made to restrict the rule to suits at law. Naturally the attempt failed, for various of the cases above listed—in which, as the court says, the rule "recognized" in *Bond v. Moore* has since been recognized and followed—were suits in equity: *yet only a few weeks later, in Biwer v. Martin, infra, this same distinction was, in a limited way, successfully introduced!* However, as things were in June instead of October, 1920, the opinion, after citing the precedents in equity, continued (at p. 581):

"In this state the rules of merger apply and are enforced in suits in chancery just the same as in suits at law . . . There are other states that hold different doctrines. Merger of estates is for the *benefit of him in whom the two interests unite, and while it will never take place when it is against HIS interests in a case in chancery*, yet when it is for *his* advantage and the *intent* is expressly stated in the [destroying] instrument, then there is no reason why a merger should not take place where the common law rule of merger is recognized."

Thus we have here a perfectly bald statement (and, of course, the statement is perfectly correct, but the point is that it characterizes the doctrine): (1) That the "intent" of the destroying instrument (its expression, not its moral quality) is essential, but that of the creating instrument—will or deed until *Biwer v. Martin, infra*, introduced a distinction—is immaterial; and (2) that the "benefit" to the destroyer is socially desirable, so that against *his* interests merger will not take place, but the benefit of the contingent remainderman is of no import. In stating the second proposition the court probably had in mind the ancient rule that when the *original* gift threw, simultaneously, into one hand, with a contingent remainder intervening, two interests that would, aside from the exception, merge, there is no merger. (*Wiscots's Case*, 2 Co. 60; Preston, "Conv.," 3d ed., III, 49, 108, 113, 488). The basis of that rule was respect for the creator's intent, any question of the taker's benefit being determined wholly by the judgment of the creator. And, that being so, mere union of two interests, simultaneously, in one person ought no more to cause merger *later* than in the beginning; the intent of the original creator ought to be respected, if at all, permanently. The law, however, did

not so reason. As we have the doctrine, its justice or injustice becomes, then, simply a question of the relative value of the property rights of life tenant and remainderman. In the medieval period the doctrine, or fact, of merger was to a very considerable extent controlled by the intent of interested parties (Preston, "Conv." 3d ed. III 43-9, 409, etc.); but the interest of the contingent remainderman was negligible, and therefore as to him the rule of destructibility had unimpeded way. In Illinois today we have the same rule on the assumption of the same economic conditions.

The court has, of course, since *Bond v. Moore*, become fully conscious of these facts. Thus in the case just quoted from we also read (at 583):

"This court has plainly indicated *the only way* by which a *testator* can protect his will from being thus defeated in the absence of a statute (*Lewin v. Bell*, 285 Ill. 227). This case"—i. e. the case before the court when speaking—"like all others that have been decided before it, necessarily defeats the intention of the *testator*, and it will continue to be the case *as long as the common law rule is in force*. It is, however, the undoubted law of this state, whether it be by a proceeding at law or in chancery."

So far as testators are concerned it is still the law. But in equity, at least, and as regards limitations created by warranty deed instead of by will, the law was changed a few months after the above was written by the novel case of *Biwer v. Martin*, 1920, 294 Ill. 488.

In that case J. B. was seized of a fee simple, and by warranty deed created interests in the land by the following limitations, after a life interest reserved to himself: (1) to Z, the grantor's son for life; then (2) to Z's widow (any widow) for life; (3) to the lineal descendants of Z, him surviving, in fee simple, taking per stirpes; with (4) a power of appointment to Z in default of such descendants; and (5) a "remainder" over, in default of the appointment, to all lineal descendants of the grantor in fee. The last limitation was not a true remainder, and left a fee reversion in J. B. The power of appointment was destroyed by Z's acts. Through execution sale Z's interests passed to Longan, and the father's passed to Biwer. The latter then, by separate deeds—it does not appear whether by warranty deeds—and with the intention, therein explicitly stated, of destroying contingent interests, conveyed to Longan both the life interest and the reversion of J. B. Longan later reconveyed an undivided fifth interest to Biwer, and he sought a partition, which was decreed below. At this point an appeal was taken by Z's children, who contended that if their interests were contingent under (3)—which, of course, the court held them to be—they had not been destroyed by merger.

And so the court held.

The interesting thing is the device to which resort was had to prevent destruction. It was a case of using one medievalism to destroy another; an appeal, namely, to the doctrine of estoppel by warranty—of course, a doctrine of most equitable and desirable

character, so that we may well be thankful for its existence in the law's armory of the same age as the destroying dragon of merger, being therefore available, under the fair rules of the common-law-adoption game, for the slaying of the latter. And notwithstanding that in Preston's whole volume of merger ("Conv." 3d ed. III, 1829) one finds no hint that it was ever so used before, that is only to the credit of the court, showing as it does that the oldest law can be made to serve new ends in doing justice. The court said:

"The original holder of the reversion, [J. B.] Martin, had created such contingent remainders by his deed, and by his covenants of warranty had warranted that when these remainders had, by the happening of the contingency specified, become vested, the holders thereof should have the quiet enjoyment of the land. . . . The question arises here whether the grantor should in equity and good conscience be allowed to destroy by conveyance a right he has created by deed with covenants of warranty. We think not. If it is sound doctrine—and we believe it is—to say that where the grantor conveys an estate he does not own, such estate is to pass under his covenants by way of estoppel when acquired by him"—the court cites elsewhere on this: *Phelps v. Kellogg*, 15 Ill. 131; *Bennett v. Waller*, 23 Ill. 97; *Walton v. Follansbee*, 131 Ill. 147; *Williams v. Esten*, 179 Ill. 276—"we can see no reason why such grantor should not be estopped to breach his covenants of warranty by an act of conveyance, which would have the effect of defeating the remainder granted by him. The rule of estoppel by deed is based upon [a] broad, equitable ground . . . It is settled in this state that a grantor in a deed is not allowed to attack a title the validity of which he has covenanted to maintain . . . This is true whether the deed conveys a present or future interest. *Smith v. Carroll*, 286, Ill. 137; *Walton v. Follansbee*, supra. Since the grantor and his heirs and assigns are not permitted to deny the title which the grantor by his deed conveys, but must defend the same, it would seem by all equitable principles that he or they should not be allowed to breach by his or their act of the covenants of warranty contained in such deed" (294 Ill. at 494, 497-98).

It has been suggested (Harv. L. R. XXXIV 359 n., but compare id. 430-32) that in *Biwer v. Martin* the court, "to determine the effect of a warranty deed . . . found it necessary to go back to the doctrine of lineal warranty before the statute of *Quia Emptores*." Were this so it would be deplorable, for Illinois lawyers might well shrink from mastering what Coke could characterize as "one of the most curious and cunning learnings of the law" (Co. Litt. 366a). Such a result would be here the more deplorable, because not only do we lack, unlike various other states, a local statute abolishing lineal and collateral warranty (Kent, "Com." IV 469; Rawle, "Covenants," p. 354-58), but the statute of Anne (Blackst. "Com." II 303; Rawle, op. cit. sec. 238) by which the rebutter in case of collateral warranty was in large part abolished is a century later in date than the adoption-date of the English law in Illinois. Fortunately, however, there is no principle whatever

of ancient warranty in *Biwer v. Martin*, nor even remote analogy to lineal warranty, before or after 1290. There is, of course, one broad analogy between damages on covenants for title and the old remedies of voucher and warrantia chartae (Sedgwick, "Damages," 9th ed. sec. 951); but it is one true of all jurisdictions, and, besides, no question of damages on covenants—i. e., nothing of the covenantor's active burdens—was involved in *Biwer v. Martin*. What was involved was the covenantor's passive burden of estoppel. As regards that burden, it is true that broad "equitable" principles of estoppel run through the law of warranty from beginning to present; but in the application of those principles in *Biwer v. Martin* there is nothing allied to or suggestive of the restriction upon their operation which was imposed by the rules of lineal warranty. Rebutter was that estoppel which precluded one from taking title to land that his ancestor had ineffectively attempted to convey with warranty, the title either therefore descending upon the heir (or quasi-heir in entails) or outstanding in a true owner, so that in either case the heir could have taken it—in the latter case by purchase—but for the rebutter (Poll. and Maitl., "Hist. E. L." II 312; Rawle, op. cit. sec. 237 et seq.). The distinction between lineal and collateral warranties (Challis, "Real P." 3d ed. 307; Elphinstone, Law Q. R. VI 282-83; Blackst. "Com." II 301-2; Butler's Notes to Co. Litt. 370a, 373b) was developed in relieving certain heirs of the general principle of rebutter; that is, was a restriction, fundamentally just though excessively technical, upon a broad "equitable" principle. But it is unnecessary even to state the distinction, because in cases like *Biwer v. Martin* there could never have been the old rebutter, nor therefore any application of the restrictions, whether in lineal or in collateral warranty, upon it. For it is evident that if a warrantor actually held the fee (as J. B. Martin did in *Biwer v. Martin*), and conveyed it, there could not possibly be rebutter thereafter (Poll. and Maitl. op. cit. II 312; Butler's note to Co. Litt. 373b; Rawle, op. cit. p. 7 n. 2; Elphinstone, Law Q. R. VI 282). And, anyway, there was no question in *Biwer v. Martin* of the estoppel of an heir, but one of estoppel of an assign.

Suppose, however, another case—one involving a covenantor's active burdens; suppose, namely, that after an attempted destruction of the contingent remainders a warranty deed were given purporting to convey the reversion free of such remainders. The deed would be ineffective, and therefore there would be a breach of the covenant. Who would be liable upon it? Evidently, the covenantor; and after his death his estate; and whether his heirs or devisees would be liable, either during or after final settlement of his estate, is simply a question of common-law and statutory liability of real estate for debts of the decedent (Ill. R. S. ch. 59 sec. 11-14; *Crocker v. Smith*, 10 Ill. App. 376; *Hill v. Hill*, 264 Ill 219, 228; Rawle, "Covenants," sec. 301-12; Jarman, "Wills," 6th Amer. ed. by Bigelow, p. *1387 n. 1 and 6th Eng. ed. p. 1987, et seq.). The heir—since the alleged analogy is to lineal warranty we may speak of heirs alone—is liable, not on the theory of warranty as it existed prior to

1290—true homage or feudal warranty, a lord's heir accepting a vassal's homage and giving warranty in return; not on any principle of benefits and burdens "running" indefinitely (this is the accepted description, but compare Sims, "Covenants," 37) to and upon heirs of warrantee and warrantor; but solely on the other principles referred to. The modern burden is personal and contractual; the old was "real" and implied from feudal relationship. The one (the continuing duty of warranty, not under our statutes the liability for consummated breaches thereof) is for the covenantor's lifetime (therefore the benefit also, save as an accrued benefit is heritable); the other was of indefinite duration. As for an heir's liability on consummated breaches, this was due in homage warranty to the fact that the heir was—right up to Bracton's day, or to *Quia Emptores*—practically a universal successor (Holmes, "Com. Law," 347-48, 371-2). As for "assets," of course an heir who has none never paid debts; but "assets" in the doctrine of lineal warranty meant something totally different from the modern word (Co. Litt. 374b). There is, then, *no* analogy, either as regards the transfer of the warranty burden or liability for consummated breaches, *before* *Quia Emptores*; nor any, in these respects, between our modern covenants and the express warranties that filled the period between *Quia Emptores* and the Statute of Uses.

It is true that in feoffments made *after* *Quia Emptores*, and therefore without homage, liabilities under the warranty implied from the feoffment word "*dedi*" were limited by the joint operation of *De Bigamis* and *Quia Emptores* to breaches in the warrantor's lifetime (whence, in part, the introduction of express warranties, whereof the burdens ran indefinitely provided heirs were named); and so the heir's liability was just the same as under modern covenants for title (Rawle, *op. cit.* sec. 4, 271; Poll. and Maitl., "History E. L.," II 13, 249, 310-11; Preston's *Shep. "Touch."* p. *181 n.). But this analogy is common to all our jurisdictions, and there is nothing in it—even if this analogy were referred to—that would be a reproach to the Illinois court. It may be added that as regards *benefits* there are various and fundamental analogies between the medieval express warranties, and to a more limited extent homage warranty (provided we ignore the point made by Sims, above referred to), and our modern covenants for title (Rawle, *op. cit.* sec. 204; Holmes, "Com. Law," 377, *et seq.*); but these, again, are common to all our jurisdictions, are no reproach to any, and have nothing to do with lineal or collateral warranty.

The principles upon which *Biwer v. Martin* was decided were, as the court said, broad "equitable" principles. They were principles of estoppel. There is no need here to stress precise historical connections. After all, the warranty implied from the mere feudal relationship, or from *dedi* in charters, and later from express warranties and covenants for title, whatever be their form or number, are alike in this, that they are means of holding a grantor to equitable duties; **and despite the gulf, as regards feudal incidentals and distinctions in the running of benefits and burdens, between the old war-**

ranty and the modern covenants, those general duties have been brought across the gap. To require a precise genealogy before accepting a modern application of the broad doctrine is similar to insisting that our statutory conveyances do not take effect directly and according to expressed intent, approved by our statute, but that one must first find a consideration which will by medieval reasoning raise an obligation of conscience by way of use, which can then be executed by a medieval statute (compare Ill. Law Bulletin, Dec., 1919, 351-61, H. W. Ballantine).

It is believed that *Biwer v. Martin* stands upon sound principles of estoppel. The first question is as to the right of a contingent remainderman to take the benefit of a covenant for title. Were it necessary to seek in doctrines of ancient warranty for something applicable today to interests that did not then exist, the search would fail. A warranty must be "supported" by a freehold estate, in hereditaments corporeal or incorporeal, in the warrantor at least (Co. Litt. 366a)—and that could be satisfied; but such a warranty, given by deed, could not be made to the contingent remainderman, nor could he—it being a question of having the advantage while the remainder is still contingent, the remainderman perhaps not in esse—take or claim the benefit (Preston's Shep. "Touch." p. *186, 198: Co. Litt. 366a). But of what importance should it be now that either those rules or the general medieval metaphysics of incorporeal and contingent interests (Holdsworth, "History E. L." III 131-34, 195-96) would once have precluded an appeal to the protection of estoppel? The appeal and the application of the protecting principle were both novel in *Biwer v. Martin*; but the only question really involved was whether contingent remainders are property. If yes, they were entitled to the protection of estoppel. As a matter of fact, in that field their recognition was not new. Estoppel has always been the friend of contingent remainders, as has been seen above. In Illinois contingent remainders have been initially conveyable (not transferable) by estoppel not only in the case of unqualified deeds with covenants (the line of cases cited by the court in the above quotation), but even in the case of similar quit-claim deeds (*Jones v. King*, 25 Ill. 335, and its following; Bigelow, "Estop." 6th ed. 435, et seq.). And apparently, in Illinois, as already noted (*supra*, p. 598) they are alienable only so and by release.

The next question is, as to the obligation resting upon the creator of the remainder, and on this point there can be no doubt. The court, in the extract from its opinion quoted above, appeals to the rule of title by estoppel: if one assumes to convey with warranty what he has not, and, later acquiring it, the estoppel vests the title in the grantee, then a fortiori he should not be allowed to destroy an interest he has created, conveyed, and warranted. The only weakness in the argument is the inequity of the doctrine of title by estoppel, which operates regardless of all intervening equities whatever (Rawle, op. cit. p. 370 n., 402, et seq.). We may reject that doctrine, however, and declare inequitable the statutes which in various states, including Illinois (Hurd's Rev. Stat. 1919, c. 30

sec. 7), have recognized it, and still the argument remains that what one is estopped to take for himself after warranting it to another, he certainly may not destroy. In express warranty the heir was bound by the rebutter only because his ancestor was bound (Co. Litt. 386a; Preston's Shep. "Touch." p. *186, exception as to wills); but though today, when the personal contractual nature of warranty is clearer, a covenantor for title may exclude personal liability, throwing this solely upon his estate after death (*Rufner v. McConnell*, 14 Ill. 168, *Baker v. Hunt*, 40 Ill. 264, *Traynor v. Palmer*, 86 Ill. 477; compare *Hawk v. McCulloch*, 21 Ill. 220, *Bowman v. Long*, 89 Ill. 19) this does not in the least affect rebutter, which operates (today in broadened form) in all cases of title by estoppel—with justice when, as is usually true (Rawle, op. cit. sec. 256) there are no intervening superior equities, the English cases solving all problems by balancing the equities (id. 262). The principle has usually, in this country, received careful consideration only in title by estoppel cases. In such a case, *Van Rensselaer v. Kearney*, 11 How. 297, the Supreme Court of the United States said of its application in those cases: "If the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever denying that he was so seised and possessed . . . The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one" (p. 325). And the court in *Brewer v. Martin* rightly said that it rested on the same broad principle. The rules that a grantor is estopped to assert against his grantee anything in derogation of his deed, or to deny full effect thereto (*Needham v. Clary*, 62 Ill. 344; *Wead v. Larkin*, 54 id. 489; *Kearney v. Kirkland*, 279 id. 516); the consequent doctrine of title by estoppel; the rule that an assignor may not in any way defeat his assignment (*Eaton v. Mellus*, 7 Gray 566; *People v. Tioga*, 19 Wend. 73); that though a grantor is generally not liable on covenants for title for failures caused by matter subsequent he is so liable for failures due to his own acts (*Hamilton v. Doolittle*, 37 Ill. 473; *Jones v. Warner*, 81 id. 343; *Dugger v. Oglesby*, 3 Ill. App. 94); and that in general he is strictly held both to the letter and the spirit of all his covenants—these rules (call them individually estoppel "by deed," "quasi-estoppel" by inconsistent positions, etc., as we may—for nothing is looser than the terminology of estoppel: Bigelow, "Estoppel," 6th ed. 362, 491-92, 749) are in substance merely varying statements of one principle of fair dealing. The principle was stated by the Supreme Court of Ohio in its broadest form, as follows: "The obligation created by estoppel not only binds the party making it, but persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead and are subjected to all the consequences which accrue to him" (*Douglas v. Scott*, 5 Oh. 194 at 198. Compare *Hardy v. Pecot*, 113 La. 350 at 362).

Subject to intervening equities, if superior, why not?—and therefore against such an assignee as in *Biwer v. Martin*. The basis of the doctrine is in fact utterly independent of the law of covenants for title or of warranty; it is independent of covenants; it is a matter of intention, howsoever expressed (Rawle, op. cit. sec. 255, 265; Bigelow, op. cit. 362; *Condit v. Bigelow*, 64 N. J. Eq. 504, 513). The burden of restrictive agreements, and in this country even affirmative agreements, regarding the use of land, is imposed by equity upon takers with notice; and, as Dean Ames showed, equity has developed, in the specific performance of contracts against such third persons, a system of principles that almost exactly parallels, although in no way built upon, the rules of warranty (Harv. L. R. XVII 183-84; "Essays," 391-92). His parallel is with reference to those who can take the benefits; but it is believed that it holds equally as to the burden, and, with respect to both, because both doctrines are underlain by the common equitable idea of fair dealing. The principle is no more indefinite than are the conceptions of "unjust advantage," "harsh exactions," "inequitable conduct," and the like, that run through specific performance. The rule established by *Biwer v. Martin* is another equitable rule, in some degree paralleling, but in no way dependent upon, principles of warranty. In the case of leasehold covenants for title these are binding upon the assignee of the reversion (Rawle, op. cit. sec. 313); there is no reason whatever why they should not be equally binding upon the assignee, with notice, of any other reversion. It is certain that the considerations of public policy that enter into the growth of easements and of covenants other than for title that run with the land at law or in equity, will never hinder the running of covenants for title. It is also certain that privity, in the law of warranty and in estoppel has always meant simply succession to the title of the person originally warranting and estopped (Holmes, "Com. Law," 404; Bigelow, "Estoppel," 6th ed. 378, 629).

It is believed, then, that the decision in *Biwer v. Martin* rested on sound principles and that their application therein enabled the court, as it said, to reach a result that "is consonant with equity and justice and contravenes no settled rules of law." The absence of precise precedent is of no moment when weighed against those principles and the justice and utility of the result. And as for novelty, it may be remarked that trusts to preserve contingent remainders were a device that occurred to nobody for two centuries after such interests became valid, and for a century after they became common (Gray, "Perpetuities," sec. 134, 192 n.).

Returning to the question of positive liabilities of an assign under his assignor's covenant for a title clear of a contingent remainder that in fact is outstanding, it may be asked which covenants would be violated in such a case. In Illinois the statutory implied covenants, implied from the operative words grant, bargain, and sell, are: seisin of an indefeasible fee simple, against incumbrances "done or suffered from the grantor," and for quiet enjoyment subject to express limitations (Hurd's Rev. St. 1919 c. 30 sec. 8); and the words "conveys and warrants" include covenants

of indefeasible seisin and right to convey, a general covenant against incumbrances, and for quiet possession and defense (*id.* sec. 9). The statutory implied covenants have the same potency in passing an after-acquired title that express covenants have (*D'Wolf v. Haydn*, 24 Ill. 525, *King v. Gilson*, 32 *id.* 352), and may therefore certainly be considered of the same effect in the present connection. Evidently a covenant of indefeasible seisin would be violated (*Fraser v. Supervisors*, 74 Ill. 282). The same is true of a covenant of general warranty or of quiet enjoyment, which for most purposes are identical (but compare *Anschutz v. Miller*, 81 Pa. 212, on the degree of contingency); it being remembered that eviction in Illinois includes exclusion by the better right from taking possession. The covenant against incumbrances suggests interesting questions. The accepted definition of an incumbrance is something restraining user or enjoyment, but consistent with the passing of "the fee" (Rawle, *op. cit.* sec. 75 and next case cited); and therefore, for example, dower, either consummate or contingent, though it may partly defeat the title by taking a freehold in a portion of the land, has often been held to be an incumbrance (*Prescott v. Trueman*, 4 Mass. 627; *McCord v. Massey*, 155 Ill. 123). On this principle any contingent remainder, there being a fee reversion as in *Biwer v. Martin*, would be an incumbrance; and in *Christy v. Ogle*, 33 Ill. 295, it was held that where the grantor gave a deed of the fee with a covenant against incumbrances, and held a life interest that was inalienable, this was a breach of the covenant. But surely this leads to absurdities. It is believed that the only rule justified by older cases was, that an incumbrance is anything restricting user or enjoyment that is consistent with the passing of "the title" professedly given—usually a fee simple, whence the confusion—in all the land professedly conveyed. The fact that none of our covenants depend upon technical words for their creation or distinction makes the question more doubtful. What is certain is, that if it occurs to a conveyancer to mention possible contingent interests he will most probably do this in the covenant against incumbrances; and so, for example, in *Walton v. Follansbee*, *supra* (at p. 159), the covenant read that the premises were "free and clear of all other grants, bargains,"—which would cover an equitable fee—"sales, liens, taxes, assessments, contingent estates, and incumbrances of what kind or nature soever."

The enforcement of these positive burdens of the covenants, as distinguished from the passive burden of estoppel that alone was actually involved in *Biwer v. Martin*, will simply strengthen the sound principle of that case as a restraint on the destruction of contingent remainders.

The extension of the doctrines of estoppel and warranty seems then to be effective, equitable, and free from any real dangers; and it is therefore to be welcomed.

IV

We have reached these results: (1) Since 1837 contingent remainders have been safe, by virtue of a statute, from the moment

that the holders originally not in esse, are in womb (supra, p. 587). (2) Under *Fraserv. Supervisors*, supra, p. 587, contingent remaindermen of a certain class, namely, lineal heirs of the life tenant, were safe from 1874 to 1918, but *Lewin v. Bell* has deprived them of safety (supra, p. 589). (3) The Supreme Court has gone so far, in its consideration of the doctrine of *Bond v. Moore*, as to expressly declare that, "While it is true that under the rule in this state a contingent remainder is not an estate that may be conveyed voluntarily by deed except by way of release or estoppel, yet it is a valuable right conveyed to the remaindermen in the land" (*Biwer v. Martin*, 494 Ill. at 500), and therefore worthy of some protection. (4) We have also an explicit declaration by the court that the rule of *Bond v. Moore* is "a rule that should never be applied unless its application is demanded by reason of the facts coming squarely within it" (*Biwer v. Martin*, at 494). (5) Consequently, if no destroying deed has actually been given, but only a bond to do so, this is "not equivalent to making such a deed" and there is no merger and destruction (*Hill v. Hill*, 264 Ill. 219, per *Biwer v. Martin*, at p. 499). This also is, of course, highly desirable. (6) We have another express declaration that "courts of equity will not lend their aid in doing an unjust thing. It is only where the facts bring the case within the common law rule and the application of that rule does not contravene other settled law that equity will apply that rule where, as here, its application works injustice" (*Biwer v. Martin*, at p. 494). This is good so far as it goes. It is only unfortunate that the same court that introduced the rule of *Bond v. Moore* can correct the doctrine when acting in equitable suits only; and then only to the limited extent next to be indicated. (7) In *Biwer v. Martin*, the court therefore establishes "another exception to or qualification of the general common-law rule in relation to the destruction of contingent remainders" (*Biwer v. Martin*, at p. 498); namely, that that result shall not follow when the rule demanding it contravenes the other settled rule, and more equitable rule, of estoppel by warranty. This, too, is good so far as it goes. (8) However, it does not go far. It covers only cases where the contingent interests were originally created by warranty deed of the creator and the party who later seeks to destroy them "stands in his place," as a grantee of the reversionary title. (9) Consequently, though the result of *Bond v. Moore* may, in retrospect, seem to work injustice, that cannot be helped, for that "was a case arising under a will, and therefore the effect of covenants of warranty did not there arise" (*Biwer v. Martin*, at p. 500). Similarly, in *Gray v. Shinn*, supra, "the reversion was created by will," and consequently the heir who took that by descent and a life interest by devise "was under no covenant of warranty, and there was therefore no intervening rule of law which prevented the operation of the common-law rule with reference to the destruction of contingent remainders" (*Biwer v. Martin*, at p. 498).

These are great gains. Nevertheless, they leave the doctrine of destructibility by merger only slightly limited by the restrictions

placed upon it. Moreover, our discussion has been confined to destruction by merger, but in the opinion of Mr. Kales ("Estates, Future Interests," 1920, sec. 453, 455, 464, 46) conveyances by livery of seisin are apparently possible, and therefore tortious conveyances, in Illinois. What if this should be attempted? Would the court take the stand that any medieval doctrine is to be recognized by it unless it is under prior orders from the legislature not to do so?—for this is assuredly a fair statement of its excuses with reference to *Bond v. Moore* (supra, p. 600). And aside from all unnatural terminations of the particular estate, there remains the injustice of permitting contingent remainders to fail through not vesting before the natural termination of the preceding estate. The dictum of *Madison v. Larmon*, supra, p. 589, has certainly come to be appreciated in its true light by the Supreme Court; but, without the aid of the legislature, there seems but one judicial weapon available to end the doctrine of destructibility. That is the precedent of *Gavin v. Curtin*, supra, p. 589. *In the absence of a statute, Gavin v. Curtin offers the only basis for abrogating, practically, the doctrine of destructibility by merger.* Would the court have courage to carry that case to its logical end? If not, at least let *Lewin v. Bell*, supra, p. 589, be overruled, and *Frazer v. Supervisors* restored; for such contingent remainders as were there involved are exceedingly common.

What we need are two statutes: one making contingent interests freely alienable as property, the other making such remainders immune against destructibility by the termination, naturally or unnaturally, of the preceding estate before the moment of their vesting. Such statutes were drafted in 1907 by Mr. Kales (ILL. LAW REV. I 378, 380). Those, or similar statutes, should be passed at once. They should receive, as did the statute passed in Massachusetts in 1916, the undivided support of the bar. It is quite possible that a third statute should be passed to provide for the practical convenience of providing some "means whereby the fee simple may always be dealt with in spite of the existence of legal contingent future interests, leaving the actual beneficial interests as created" (Kales, ILL. LAW REV. I 375). This is simply a matter of public policy. (Compare the powers of life tenants under modern English statutes; Jenks, "Mod. Land Law," 422 et seq.). The first thing to do, however, is ungrudgingly to recognize and protect contingent remainders as property. As Joshua Williams says of older times in England, "It was of very little use to create them, because they were destructible in several ways" ("Seisin," 190, 192). They are still so destructible in this state, and their creation is still useless.

F. S. P.

RECENT CASES

ATTORNEY AND CLIENT—INDORSEMENT OF CLIENT'S CHECK.—In *Crahe v. Mercantile Trust and Savings Bank*, 295 Ill. 375, 129 N. E. 120, the plaintiff recovered judgment against a railway company and the company in satisfaction gave its check payable to the plaintiff and her attorney, jointly. The attorney indorsed his own name and that of the plaintiff and the defendant's bank paid out the amount of the check on that indorsement. Plaintiff sued for conversion of the check. The Supreme Court allowed the recovery, holding that the attorney had no authority to indorse the name of the judgment creditor merely by such relation of attorney and client, since the power to indorse checks must be expressly conferred. The court treated the precise question as a new one, but an examination of some of the cases cited by the defendant shows that the point was debatable until the decision in the principal case.

BANKS AND BANKING—REMOVAL OF CAUSES.—An important decision defining the powers and duties of a federal reserve bank and classifying it as a banking institution is given in the recent case of the *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta* (Ga.), 269 Fed. 4. Originally a suit in equity was filed in the state court of Georgia praying for an injunction restraining the Federal Reserve Bank from collecting checks drawn on the complainant except in the usual and ordinary channel of collecting checks through correspondent banks or clearing houses. The object was to prevent the defendant from collecting checks by presenting them over the bank's counter. The suit was removed to the district court by the defendant, and there the bill was dismissed for want of equity, and on appeal, the circuit court of appeals affirmed this decision and held the case was properly transferred to the federal court. The appellant contended that the Federal Reserve Bank was a national banking association within the meaning of the federal statute conferring jurisdiction upon state courts. However, in overruling this contention the court held that Congress, in creating the federal reserve banks, did not intend to include them within the classification of national banking associations, because of the difference between their functions and because of the number of reserve banks established. The federal court properly had jurisdiction for two reasons: (1) The Federal Reserve Bank was incorporated under an act of Congress, and was neither a railroad corporation nor a national banking association, and (2) the petition or bill introduced a federal question, in that it charged the acts of the defendant were ultra vires the powers of the Reserve bank, granted by the Federal Reserve Act.

The method of the defendant in presenting checks over the counter was held to be proper and within its authority. The Federal Reserve Act prohibited the Reserve bank from paying for the

cost of remission as had been the custom of the complainant bank to make such a charge. The Reserve bank could not therefore collect checks drawn on banks which insisted on deducting for the cost of remission, through the regular channels. It would be forced either not to handle the checks, or to present them for collection over the counters of the drawee banks by agents. The court decided the Reserve bank could properly exercise the latter alternative, and was not prohibited from paying the necessary expenses of collection in this fashion.

Appellant further contended that even though this mode of collection was proper, the defendant could not exercise the right oppressively, by accumulating a large amount of checks before presentation; and since they were threatening to do so, they should be enjoined. But, since the bill contained no specific charge of such a threat, nor that the defendant was acting from a merely malicious purpose, there was nothing on which a court of equity would be justified in acting.

The averment that the defendant's purpose was to compel appellants to accept the lesser of two evils and to remit at par for checks drawn upon it, would not, in the opinion of the court, constitute legal duress, even if the charge was substantiated by evidence, which was not done. The evidence showed the adoption of a system of universal par clearance, which was advocated by the defendant in good faith, as well as by Congress and the Federal Reserve Board. Such an adoption could not properly be attributed to malice on its part towards appellant and other banks in like condition.

CHATELS—CONFISCATION OF PROPERTY UNDER STATUTES—DUE PROCESS OF LAW.—The doctrine of the deodand has been exhumed by an analogy in the recent decision of the Supreme Court of the United States in the case of *Grant Co. v. United States*, 41 Sup. Ct. Rep. 189. Under Section 3450, Revised Statutes—a section passed July 13, 1866—an automobile, the title of which was in the Grant Company as unpaid vendor, was forfeited to the government on account of having been used by three persons, none of whom was its owner, in the removal, and for the deposit and concealment of distilled spirits upon which a tax had been unpassed by the United States. The court admits the analogy between the automobile so taken and the deodand, confiscated in early days to the crown for having caused the death of a reasonable creature. It admits the superstitious origin of that rule, and quotes Blackstone's reference thereto:

"That such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punishable by such forfeiture . . .

"A like punishment is in like cases inflicted by the Mosaic law: 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall be eaten.' And among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic."

But our law loses sight of the logical reason pointed out by Blackstone in the case of the deodand; namely, that some negligence of the owner may be inferred, so that his loss of the chattel may be justified. It holds the "guilt or innocence of the owner" as "accidental" or immaterial, and says that "it is the illegal use that is the material consideration."

The case of the deodand is, of course, only an analogy to the present case, but sheds light upon this infliction of a property loss upon an innocent owner because of the delict of a personified chattel. And although the court expressly reserves its opinion as to whether a stolen chattel could be so forfeited, or whether an ocean liner could be forfeited and "condemned to confiscation, if a package of like liquor be innocently received and transported by it," still the result seems inevitable. If the guilt or innocence of the owner be immaterial, as the court says,¹ logic would make a stolen chattel subject to like confiscation, and it is hardly conceivable that a mere matter of degree should exempt an ocean liner logically coming within the rule.

The cases cited by the court upholding its position were these:

The Blackheath, 195 U. S. 361, where the question most nearly applicable to this case was one concerning the validity of confiscating a boat which destroyed a beacon. Here, however, the boat was under the control of its owners for anything that appears in the opinion, so that the precise point was not before the court. The main question involved the constitutionality of the admiralty jurisdiction exercised.

Liverpool, etc., Nav. Co. v. Brooklyn Terminal, 251 U. S. 48, where the boat doing the injury was under the control of its owners, and the question involved had to do with the limit of the owner's liability.

United States v. Stowell, 133 U. S. 1, which involved the confiscation of property in a distillery for evading a tax on distilled spirits. This case expressly held, under a differently worded statute, it is true, that the only interest in the distillery which could be confiscated was that of persons who "knowingly or voluntarily permitted" articles to remain on the premises, which were actually used in the illegal business. And here the interest of an innocent mortgagee of the land to whom a quit-claim deed had been given was exempt from confiscation, leaving the equity of redemption of the guilty mortgagee the sale of real property subject to the confiscation.

Dobbins Distillery v. United States, 96 U. S. 395, however, is strong authority in support of the court's position. There an innocent lessor's interest in the property was confiscated for the offense of the lessee in defrauding the revenue. And there is a great deal of language in the case bearing directly upon the matter of the materiality of the owner's guilt or innocence, and holding that knowledge of the illicit act is not necessary in order to main-

1. "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."

tain the forfeiture, and that if there is mere knowledge that his property is used in the business, that is sufficient, regardless of whether he knew the business was illegal.

The Palmyra, 25 U. S. 1, involved confiscation where the owners were in control, and hence does not bear upon the particular question under discussion here.

These are the only Supreme Court cases cited in support of the decision. There are a few circuit cases cited which need not be commented upon here.

Assuming these cases to have been correctly decided, it is possible, it seems, to differentiate the situation of the innocent lessor of premises from that of the innocent vendor who retains the title. There is undoubtedly more privity between one who still retains many substantial interests in property and his lessee (as in the *Dobbins* case) than between a vendor who retains a bare legal title and his vendee (as in the *Grant* case). And it seems clear that one who leaves chattels on property where they are illegally used may also be justly held for their forfeiture on account of his responsibility for their whereabouts, even though he is innocent of their illegal use. But to confiscate the property of one who merely holds the bare legal title in a chattel for security, without having any possible control over the whereabouts or use thereof, seems to be stretching the doctrine too far, although it is consistent with dicta to the effect that the illegal use is attributable solely to the chattel itself.

The court reserves its opinion as to stolen goods, but it is submitted that when such a case comes up one of two things must happen. Either the element of control of the owner over the chattel, and therefore his negligence which has so far been tacitly regarded as the basis for confiscation (e. g., in the *Grant* case the citation from Blackstone shows that the court at least considered this element) and has been present in all the cases decided on this point, must give way; or else—and this seems the more logical one—the idea of the immateriality of the innocence or guilt of the owner must be abandoned and consigned to the scrap heap with its brother, the superstitious doctrine of the deodand. R. B.

CORPORATIONS—DE FACTO CORPORATIONS—NO PARTNERSHIP LIABILITY OF STOCKHOLDERS.—The plaintiff in the case of *The Inter-Ocean Newspaper Company v. Robertson*, 296 Ill. 92, had published certain advertising for an organization known as the Chicago Real Estate Show Co., which purported to be a corporation, but which had in fact neglected to file for record its final certificate of complete organization. This action was brought against the defendant to charge him as a stockholder, the company having long since become insolvent. The defense was that the real estate company was a de facto corporation and that the contract had been made with it on its credit as a corporation and not with the stockholders or with any one of them.

The question of fact as to whether the real estate company

was a de facto corporation was settled by the proof that there was a valid law under which it might have been organized, an attempt in good faith to organize under that law, a colorable compliance with the law, and a user of the corporate powers.

The court then held, as a matter of law, that stockholders of such a de facto corporation are protected from liability to creditors as partners. There had been apparent confusion in this state prior to this decision as to this particular point. The court in the principal case, however, thought the confusion more apparent than real and distinguished the case of *Loverin v. McLaughlin* (161 Ill. 417) and subsequent cases, repeating some dicta in that case, on the ground that the suits in those cases had been brought to enforce a purely statutory liability and had not directly raised a question of the liability of stockholders as partners at common law.

It is to be noted, however, that the decision does not extend to officers of a de facto corporation, whose statutory liability is affirmed by implication in the instant case. [The principal case will be considered in a case comment in the next issue of this REVIEW.]

CORPORATIONS—POWER OF MAJORITY STOCKHOLDERS—MONOPOLIES—SHERMAN ACT.—In *Geddes v. Anaconda Copper Mining Co.*, 41 Sup. Ct. 209, the complainant represented the minority stockholders of the Alice Gold and Silver Mining Company, whose business had become unprofitable and had consisted for years simply in the leasing of its mines "from which it received insufficient revenue even to pay its limited expenses." The company was not insolvent, but it was clear that there was no reasonable prospect of its being able to pay its debts and continue its business. A majority of the stockholders voted to sell its property, over the protest of the minority stockholders, to the Anaconda Company, and to dissolve the corporation. This bill was filed praying a decree that the sale be declared void and that the proceedings to dissolve the company be stayed pending the final decree in the case.

The grounds upon which the complainants based their claims were four in number:

First, because the purchase was made for the purpose of monopolizing the production of copper in violation of the Sherman Anti-Trust Act;

Second, because the majority stockholders could not authorize the sale of all the corporate property over the protest of the minority stockholders;

Third, because the Alice Company could not acquire stock in another corporation (the consideration for the sale being a transfer to it of stock in the Anaconda Company); and

Fourth, because the sale was negotiated by two boards of directors with a common membership and for inadequate consideration.

The court reversed and remanded the decree, laying down the following rules:

There is no monopoly where a corporation produces only twenty-two per cent of the copper production of the United States,

and where there is no showing that it controls prices or restricts the output.

In spite of a protest by minority stockholders, the majority stockholders may sell all the corporate property when it appears that the corporation, though not insolvent, cannot continue its business because there is no reasonable prospect of its being able to obtain sufficient money to pay its debts and meet its operating expenses.

The receiving of stock of another corporation in payment for a transfer of the corporate property, is equivalent to a sale for cash at the market value of the stock received, where that stock has a wide and general market and can be converted into cash at any such market.

The burden of showing the entire fairness of a sale between two boards of directors having a common membership, as well as the burden of showing the full adequacy of the consideration for such a sale, is on those who would maintain it. This rule exists because of the jealousy with which the law regards the fiduciary nature of the relation between the directors and the corporation.

Where a court has found that the consideration for a sale between two boards of directors with a common membership is inadequate, and directs a public sale of the property, it cannot thereafter declare the original sale valid simply because at the public sale no better bid was made than the price of the original sale. The amount of a bid at a public sale is not a measure of the value of property.

CRIMINAL LAW—ABSENCE OF JUDGE.—The practice in which trial judges indulge of leaving the court-room during the course of a trial may be abated, partially at least, by the decision of *People v. Chrfriskas*, 295 Ill. 222, 129 N. E. 73. In that case, while the judge was temporarily absent from the court-room proper, but within hearing distance, counsel for the state in his argument to the jury made improper reference to another recent case of facts similar to the one on trial. The judge immediately ordered the improper remark stricken out on motion, but the upper court held that the effect on the jury was not removed by striking the statements, since the damage was already done. Three of the judges dissented on the ground that the evidence was so conclusive in favor of guilt that in this case, though conceding that the absence of the judge was very improper, it would not be ground for reversal.

INSURANCE—PUBLIC POLICY—CONSTRUCTION OF CLAUSE RELATING TO PRESUMPTION OF DEATH AFTER ABSENCE OF INSURED.—The case of *Steen v. The Modern Woodman of America*, 296 Ill. 104, 129 N. E. 546, involved a construction of the by-laws of a benefit society and particularly a by-law providing, in effect, that long continued absence of a member is no evidence of death and that no right of recovery exists until expiration of the member's expectancy of life as based on a specified mortality table. The court

decided before considering the effect of this particular clause that (1) the power of a corporation to enact by-laws is inherent and continuous, and (2) such a corporation as here concerned may by the provision in the contract of insurance reserve the power to amend its by-laws.

The contention of the plaintiff was that the member had been absent seven years; that such fact raised the presumption of his death; and that any by-law attempting to abrogate this presumption was void and of no effect as being unreasonable and contrary to public policy. The court decided for the benefit society and denied these contentions, holding (1) that the presumption as to death after seven years' absence is purely a matter of evidence and that there is no vested right in a rule of evidence; (2) the common law rule of presumption of death would be enforced where there was no contract between the parties; but a contract postponing the settlement until expiration of the member's expectancy of life in accordance with standard mortality tables is neither unreasonable nor contrary to public policy, and will be given effect; (3) a contract waiving an established rule of law is not void on the ground that it is against public policy unless it is injurious in some way to the interests of society, which is always a matter of fact in any particular case.

These holdings cover the essential points in the decision which seems to be fundamentally sound, although the Supreme Courts of at least five other states have come to a contrary conclusion on the identical by-law here involved. It would seem, indeed, that this by-law is in accord with public policy for, as the court points out, its purpose and tendency is to prevent the payment of fraudulent or fictitious claims. And again, as the court ingeniously says, "it is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts . . ."

INTERSTATE COMMERCE—THE SHERMAN ACT—CONSTRUCTION. —The federal courts in Missouri seem to have gone much further in their construction of the provisions of the Sherman Anti-Trust Act (Comp. Stat. § 8820, et seq.), with reference to what constitutes Interstate Commerce within the meaning of the Act, than any of the other courts in the country. In the case of *Herket & Meisel Trunk Co. et al. v. United Leatherworkers' International Union, Local Lodge or Union No. 66*, 268 Fed. 662, Faris, District Judge, held that manufacturers engaged in the production of goods which they intend to ship in interstate commerce are engaged in such commerce, even before the goods are made, and "a conspiracy to interfere with the manufacture and production of such goods is a conspiracy in restraint of trade or commerce, under the Sherman Act," though there is no interference with any shipment of goods after they were actually manufactured.

The case, briefly, was this: Defendants, erstwhile employees of the plaintiff, engaged in a general strike, and picketed the plant

of the plaintiff. This picketing intimidated prospective employees, so that no trunks or leather goods could be produced. Plaintiff applied to the federal court for an injunction, alleging a violation of the provisions of the Sherman Act, and to substantiate its claim produced orders from its customers in many other states, and showed its inability to fill these orders because of the picketing. The court, though highly dissatisfied with the reason for the rule, held that the rule was settled in that jurisdiction at least and allowed the injunction.

This decision seems to stretch the generally accepted definition of "commerce" within the meaning of this Act as laid down in the case of *In re Greene*, 52 Fed. 113, and approved by the Supreme Court in *Hammer v. Dagenhart*, 247 U. S. 272, 38 Supr. Ct. 529, 531, although these cases were cited in Mr. Justice Faris's opinion, and with approval.

MASTER AND SERVANT—LIABILITY OF OWNER DIRECTING METHOD OF WORK BY INDEPENDENT CONTRACTOR.—Where one undertakes as an independent contractor to execute a contract and in the execution is interfered with by the owner's representative, if that interference amounts to a prohibition against working in a particular way and a requirement that another particular method, to the exclusion of all others, be followed, the independent contractor becomes a servant of the owner and the liability for personal injuries resulting from such a deprivation of liberty of action is that of a master. And a release from liability for accident which was part of the contract is of no effect.

This is the ruling of the Circuit Court of Appeals, Fifth Circuit, in *Gammage v. International Agricultural Corporation* (268 Fed. 246). In that case a painter was not allowed to hook his platform as he desired. Instead he was required by the owner's representative to attach the hooks in a different way. To accomplish this he was supplied by the owner with rope which appeared to be safe, but which was in reality defective and known by the owner to have been exposed to acids which might give rise to defectiveness. The rope broke and the painter who was on the platform in its resultant downfall sued for the consequent injuries. As above stated, recovery was allowed.

DIVERSITIES DE LA LEY

CRIMINAL LAW—ITS ALLEGED "BREAKDOWN."—1. In the Jan. 25 number of the Northwestern Reporter (vol. 29, No. 2) are a series of opinions of the Supreme Court of Illinois, handed down in criminal cases and dated Dec. 21, 1920. There are *fifteen opinions*, of which the affirmances are five and the *reversals are ten*. *Ten out of fifteen* criminal judgments reversed! And the rate of reversals in a similar series last June, (REVIEW, XV, 352) was *six out of eight*.

If you had bought a Ford car, and started into town with it every day for two weeks, including three Sundays, and on ten days out of the fifteen it broke down at some new place in the machinery, and you had to telephone to a repair shop and secure a tow, you would, of course, at the end of the two weeks be found saying, "That car of mine is no good!" And none would dispute you.

When ten out of fifteen criminal trials are reversed for error, there is a "breakdown" of the criminal law. That general assertion of a "breakdown" is often heard nowadays, and often disputed. Former President Taft has made it; others have dismissed it as an exaggeration. But a ratio of reversals of ten out of fifteen trials seems to prove it.

2. Whether it be called a "breakdown" or given any other name is not material. It is in any event a disgrace to our system. It demonstrates that *somewhere* something is radically wrong. As an efficient piece of machinery, the criminal law does not work.

Where is the trouble?

It must be in one or more of four places; either in the substantive law, which comes home to the *Legislature*; or in the methods of *trial judges*; or in the methods of *the bar*, for prosecution or *defense*; or in the methods of the *Supreme Court*. Those are the four bodies of personnel who have a share in shaping criminal justice.

Now *where* is the fault? All parties concerned ought to feel the shame of the situation.

3. Leaving to those who best know it the answer to this question, we note here some indications on the surface that part of the responsibility lies in the over-technical attitude of the Supreme Court. The above grist of fifteen cases has several illustrations of this. One will here suffice. Take *People v. Niles*, 295 Ill. 525, 129 N. E. 97.

This was a conviction for perjury. In March, 1919, Niles, with J. and H., were indicted and tried for larceny of an automobile and knowing receipt of stolen goods. H. and J. pleaded guilty; Niles pleaded not guilty and was acquitted. In September, 1919, he was indicted and tried for perjury at the former trial. This

conviction was set aside because of errors in three instructions. The two chief errors were these:

(a) The eighth instruction told the jury that the question was whether Niles had testified falsely "as to any *material matter in the case*, as charged in some count of the indictment." This was held erroneous, because the statute requires the false testimony to be "in a *matter material to the issue or point in question*"; and the defendant "may have sworn falsely in a *material matter*, and at the same time not sworn falsely in a *matter material to the issue*." Now, advance, all ye cohorts of legalists, scholiasts, and logic-choppers of the Middle Ages, and rejoice aloud that your day has not passed away in Illinois! A "*material matter in the case*" is so different from a "*matter material to the issue or point in question*" that the jury would be misled into palpable injustice by this judicial instruction. Criminal justice, in its vital processes, turns indispensably upon this logomachy.

(b) The ninth instruction told the jury the usual rule that conviction may be had upon the uncorroborated testimony of an accomplice, if it satisfied them beyond a reasonable doubt. But this was wrong, now announces the Supreme Court, because Niles had no accomplice in the *perjury*; he did have accomplices in the *larceny*, viz., H. and J., and (apparently) they testified on his trial for perjury, and the instruction was directed to their testimony; yet, as they could only be spoken of as accomplices in the larceny, not the perjury, "the instruction was not applicable in this case, and was misleading." Yet it was applicable, in all but the merest technical sense; for the perjured testimony involved the larceny, and the testimony of J. and H. as to the perjury was testimony of persons who were accomplices in the essential subject matter on which the perjury turned. Again, the justice of the conviction is made to turn upon a verbal distinction having no real effect upon the inquiry.

The community is perturbed by an epidemic of automobile thievery. Every effort is being made to cope with it by all concerned. What is the use, if Supreme Courts are going to render fruitless this huge effort by reversing judgments on such barren technicalities?

J. H. W.

JUDICIAL SELF-DIRECTION AGAIN.—It seems that *Herbert v. Fox* (1916), L. J. K. B. 441, has by no means a monopoly of the learning relating to judicial self-direction. Our note on that case (ILL. LAW REV., XV, 125) has prompted Professor E. H. Woodruff of the Cornell University College of Law to send us a reference to *Touchard v. Crow*, 20 Cal. 150, an action of ejectment, which has distinguished claims in the present regard.

"This action," to quote from the opinion, per Field, C. J., "was tried by the court without a jury. Of course, in such cases the court not only performs the peculiar and appropriate function of deciding the law, but also discharges the functions of a jury, and passes upon the facts. The counsel of the appellants impressed, as it would seem,

with this dual character, requested the court to charge itself as a jury and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, 'Gentlemen of the jury,' and instructing that imaginary body that if they found certain facts, they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludicrous an air that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them. If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established or sought to be established, upon which the court might be called upon to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows: The mode adopted in the present case, though highly original, is not of sufficient merit to be exalted into a precedent to be followed" (pp. 163-4).

We are disposed to think, however, that the upper court dealt somewhat too cavalierly with the *modus procedendi* of the trial judge. While the form of the address tended unduly to complicate an already complex situation by superposing the problem of plural personality upon that of merely dual personality, and hence was calculated to provoke a certain amount of resentment on the part of any reviewing court, the Chesterfieldian attitude which the Directing Self had prescribed for itself toward the Directed Self or Selves was surely entitled to a word of commendation. And the idea that the court *qua* jury is not to be bound by the statements of the court *qua* court should not have been wholly destitute of appeal to a tribunal interested in improving the quality of justice. Naturally we do not believe that the trial judge, here, has made out a case for express self-direction any more than the opponents of Lord Shaw in *Herbert v. Fox* have for implied self-direction, but the rich psychological possibilities connated by his frank and formal confrontation of the situation induce a passing regret that the Supreme Court could not have approached the subject with rather less of dogmatism.

R. W. M.

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